

1 UNITED STATES DISTRICT COURT  
 2 EASTERN DISTRICT OF NORTH CAROLINA  
 3 WESTERN DIVISION

4 VARIETY STORES, INC., )

5 Plaintiff, )

6 v. )

No. 5:14-CV-217-B0

7 WAL-MART STORES, INC., )

8 Defendant. )

9 **CORRECTED TRANSCRIPT**

BENCH TRIAL - DAY 1

10 OCTOBER 11, 2016 - 10:00 A.M.

BEFORE THE HONORABLE TERRENCE W. BOYLE

UNITED STATES DISTRICT JUDGE

VOLUME I - PAGES 1 - 229

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25 Stenotype transcript with computer-aided transcription

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1 THE COURT: All right. We're ready to begin the  
2 nonjury damage phase of Variety v. Wal-Mart. It's limited in  
3 this hearing to the disgorgement issue, the equitable  
4 remedies. So I'll hear from Variety.

5 You can call your first witness.

6 MR. ADAMS: Your Honor, will we have an opportunity  
7 to make an opening statement?

8 THE COURT: If you think it will do any good, you  
9 can.

10 MR. ADAMS: Well, your Honor, our plan -- of course,  
11 as your Honor is aware, our only obligation under the statute,  
12 once our entitlement to a disgorgement is addressed, and it  
13 has been in your Honor's summary judgment order, is to place  
14 into evidence the defendant's gross profits, which we are  
15 prepared to do.

16 We'd also like to offer into evidence a certain  
17 number of exhibits, which we've identified, and some  
18 stipulations.

19 Beyond that, it's Wal-Mart's burden to demonstrate  
20 what the appropriate costs and so forth are, if you can do so,  
21 that come off of that gross number. So that's how we intend  
22 to proceed. We intend to offer into evidence a certain number  
23 of exhibits, stipulations showing what the gross revenue  
24 acquired by Wal-Mart as a result of the infringement are, and  
25 then leave it to Wal-Mart to put on its case.

1 THE COURT: Okay.

2 MR. ADAMS: All right, your Honor. To begin, we  
3 would like to offer into evidence the following exhibits:  
4 Exhibit 1, which is The Backyard -- a certified copy of  
5 The Backyard trademark registration; No. 2, the Court's  
6 summary judgment order in this case, which is Document 149.  
7 And we also refer the Court to Wal-Mart and Variety's  
8 pleadings and exhibits in the summary judgment proceeding.

9 Exhibit 6 which is Variety's Backyard Grill  
10 packaging. That's a physical exhibit. Exhibit 7, which is  
11 Wal-Mart's infringing Backyard Grill packaging, which is also  
12 a physical exhibit. Exhibit 10, which is the declaration of  
13 Matthew Kovach, dated March 7, 2016, verifying Wal-Mart  
14 Production Nos. WMS007736 and WMS007749.

15 By way of explanation, that document was provided by  
16 Wal-Mart as a result of an order by Judge Swank that they  
17 provide a simple interrogatory-style answer containing the  
18 gross revenue acquired by Wal-Mart as a result of the  
19 infringement.

20 Now, there are actually two numbers at issue here,  
21 despite Mr. Kovach's declaration, and that's a factual issue  
22 that the Court will need to determine. I'll go ahead and  
23 mention that we offer Stipulations 10 through 21, which appear  
24 on pages 8 through 11 of the stipulations that we filed last  
25 week in this case. That's Document 226.

1           Stipulations 11, 14, and 17 show that, as a result of  
2 the infringement, Wal-Mart earned \$940,997,107.78. Also, by  
3 reference to another part of Stipulation 11, 14, and 17, this  
4 is extending from a later date. From October 8, 2011, the  
5 sales are 910 --

6           MR. PUZELLA: Objection, your Honor. I really do not  
7 like to interrupt.

8           MR. ADAMS: Neither do I.

9           MR. PUZELLA: But we have a pending request  
10 concerning confidentiality as it relates to revenue figures  
11 being disclosed in open court. Given that counsel is just  
12 reading the numbers, we'd like at least an opportunity to  
13 present that request before we proceed in open court to  
14 discuss Wal-Mart's revenue numbers, profits, and things of  
15 that nature.

16           I didn't anticipate that counsel was going to just  
17 launch into reading those numbers in court. So I apologize  
18 for interrupting.

19           THE COURT: Okay. What about that?

20           MR. ADAMS: We left that to Wal-Mart. If they want  
21 to exclude individuals from the courtroom because of  
22 confidentiality requirements, we don't have any difficulty  
23 with that. We don't see the need for it. It's up to the  
24 Court.

25           THE COURT: How are you going to try this case in

1 secret? I mean, you can't do it. It's a public forum, and  
2 the courts are open and it's nothing scandalous. I don't see  
3 the need to at least at this stage -- I mean, my order and my  
4 verdict in the case is going to be public. So denied.

5 MR. PUZELLA: Thank you, your Honor.

6 MR. ADAMS: Your Honor, let me back up just very  
7 briefly.

8 The stipulations, again, are 10 through 21. And the  
9 stipulations to look at particularly regarding this issue are  
10 11, 14, and 17. The number I read earlier, the  
11 940-million-some-odd-dollar number extends from January 2011  
12 until December 7, 2015.

13 And the reason is that in this Kovach  
14 interrogatory-style answer, they provided data going back to  
15 January 1, 2011. It clearly demonstrates, both in  
16 Mr. Kovach's testimony and the physical exhibit, that they  
17 were selling Backyard Grills as of that date.

18 Nevertheless, Wal-Mart is here to contend that they  
19 didn't actually start selling grills until December 7, 2011.  
20 So there's a discrepancy in the numbers that your Honor is  
21 simply going to have to decide is an issue of fact.

22 The second number that I was reading when I was  
23 interrupted by Mr. Puzella which extends from October 8, 2011,  
24 is \$910,736,938.32. That's in the record. One of those two  
25 numbers is Wal-Mart's gross revenues. And that's the only



1     burden that Variety has to carry in this hearing, is showing  
2     what the gross revenue is. The rest of it is up to Wal-Mart.

3             Now, as far as continuing with the exhibits, we offer  
4     into evidence Exhibit 11, which is Wal-Mart production  
5     document WMS007736 and Exhibit 12, which is WMS0007749.

6             Exhibit 13 we offer into evidence is Wal-Mart's  
7     Production No. WMS0008184.

8             We also offer into evidence Exhibit 15, which are  
9     Wal-Mart's annual reports from the years 2011 through 2016.

10            As I mentioned earlier, there are several factual  
11     stipulations that we rely on. Those are Stipulations 10  
12     through 21, which appear on pages 8 through of 11 of  
13     Document 226.

14            Finally, there's one legal stipulation, which is  
15     identified as D1 on page 11 of the same document, which  
16     essentially says, as a matter of law, the question is, is  
17     Wal-Mart entitled to deduct costs beyond cost of goods in  
18     establishing profits.

19            THE COURT: The substantive law is the law of equity  
20     and the principle of unjust enrichment and what nonjury remedy  
21     equity will provide for the diminishment of the value of the  
22     trademark.

23            MR. ADAMS: That's correct, your Honor. You put your  
24     finger squarely on the point. This is an equitable  
25     proceeding. It's clear under the statute that your Honor has

1 wide discretion to fashion the appropriate remedy.

2 Under the statute, for example, once you arrive at a  
3 profit figure, your Honor has discretion to either reduce that  
4 figure or increase that figure, as the case may require under  
5 principles of equity.

6 I can do no better than refer your Honor to the  
7 Synergistic opinion, which I think is important for a number  
8 of reasons. You haven't heard the last of the Synergistic  
9 issues today, I'm sure. But I think it's important to  
10 remember what that case is all about.

11 First of all, that was not a case of willfulness.  
12 That was not a willful infringement case. Yet, when the  
13 Fourth Circuit sent that case back to the District Court to do  
14 the so-called Synergistic analysis, the Court considered all  
15 six factors. He found that three of those factors actually  
16 favored the accused infringer. The other three factors  
17 favored the trademark owner.

18 What did he do? He disgorged all of the profits,  
19 even though there was no evidence regarding diversion of sales  
20 or actual confusion. He very carefully explained in his order  
21 why that was.

22 The reason I mention Synergistic at this point is in  
23 response to your Honor's comment. I think it can't be  
24 emphasized too much that this is a case where the Court has  
25 already determined that Wal-Mart willfully infringed. In

1 fact, we've looked pretty hard, and we can't find a case where  
2 any other court has found a case where the willfulness was as  
3 egregious as this. Because it's in your Honor's order and, in  
4 fact, it's not even disputed by Wal-Mart that Wal-Mart's  
5 marketing people, brand people were told on at least two  
6 separate occasions that they were not supposed to use  
7 Variety's trademark and they did it anyway.

8 So we've offered our exhibits. We ask the Court to  
9 admit those into evidence. The stipulations and the Kovach  
10 interrogatory answer, which is under oath, establishes as a  
11 matter of law and fact what Wal-Mart's gross revenues are.  
12 And it's Wal-Mart's intention at this point to sit down and  
13 relax and have Wal-Mart tell the Court why it believes it  
14 should pay zero, which is their position at this hearing.

15 THE COURT: All right. I just wanted to -- sit down.  
16 You can sit down.

17 I'm just going to say something. But if you want to  
18 say something, that's fine.

19 MR. PUZELLA: I'll take your invitation, your Honor.

20 THE COURT: Well, it really wasn't an invitation, but  
21 it was a warning.

22 MR. PUZELLA: Just for clarification sake, it seems  
23 to me the plaintiff has offered certain exhibits by reading  
24 them in a list of exhibit numbers. Those exhibits are  
25 objected to in certain respects that's shown in the pretrial

1 order, and I just didn't want there to be any misunderstanding  
2 that those exhibits are objected to. And there are objections  
3 that need to be ruled on, and I didn't want to be silent on  
4 that topic.

5 With that, I will sit down.

6 THE COURT: I just wanted to make the point that the  
7 ancient maxims of equity, clean hands, in order to get equity,  
8 you have to do equity, all of those things come to bear on the  
9 facts in this case.

10 So you can go ahead now with your case. I'll hear  
11 from you.

12 MR. PUZELLA: Thank you, your Honor.

13 Will you hear some argument before we present our  
14 first witness?

15 THE COURT: Okay.

16 MR. ADAMS: Well, your Honor, if that's the case, we  
17 have an opening statement as well. I understood from your  
18 Honor that --

19 MR. PUZELLA: I thought we just heard counsel's  
20 opening statement?

21 MR. ADAMS: No. What you heard was our obligation  
22 under the rules of this case to offer into evidence those  
23 exhibits which we think are relevant to our case and to  
24 establish under the Lanham Act what Wal-Mart's gross revenues  
25 were.

1           If Wal-Mart wants to make an opening, I suppose I  
2 would like to do one as well.

3           THE COURT: All right. Well, you can have it after  
4 he makes his.

5           MR. ADAMS: That's fair.

6           THE COURT: Go ahead.

7           MR. PUZELLA: Am I correct that plaintiff has rested  
8 their case in chief?

9           THE COURT: I don't know.

10          MR. PUZELLA: I don't know either.

11          THE COURT: Well, they haven't made their opening  
12 statement yet.

13                                   OPENING STATEMENT

14          MR. PUZELLA: May it please the Court. Mark Puzella  
15 from Fish & Richardson on behalf of Wal-Mart Stores. With me  
16 here today, I have from Wal-Mart Mr. David Ortiz, who is a  
17 vice president and divisional merchandise manager of the  
18 company, a longtime employee. I also have a number of counsel  
19 colleagues with me as well.

20               Suffice it to say, Wal-Mart has a different view of  
21 the Synergistic factors that Mr. Adams just articulated. As  
22 to each of the factors, it's our belief that those factors  
23 have not been adequately addressed in many respects, not  
24 addressed at all in the summary judgment decision.

25               In particular, as it relates to the question of

1 Wal-Mart's intent, the evidence relied upon in the summary  
2 judgment decision concerns essentially Wal-Mart's knowledge of  
3 Variety's mark at the time that it adopted the brand.

4 Under Synergistic and cases that follow Synergistic,  
5 there must be some sort of determination of the relative  
6 degree of intentionality. That's from the BuzzFeed case in  
7 this district.

8 There's been nothing along those lines. And the  
9 Court will hear, during the course of the presentations, that,  
10 apart from knowledge of the federal registration, Wal-Mart  
11 took many other steps to distinguish itself in the  
12 marketplace. That's a relevant factor that ought to be  
13 considered under the Synergistic factors.

14 The second Synergistic factor is the question of  
15 whether any of Variety's sales have been diverted. The  
16 evidence will show none of their sales have been diverted. In  
17 fact, their sales increased over the period when the mark was  
18 in use. So that factor weighs in favored of Wal-Mart.

19 The third factor is the adequacy of other relief. In  
20 this case, Variety seeks both an injunction and reasonable  
21 royalty. Those issues are not at issue in this trial. So the  
22 Court can't weigh the adequacy of that other relief in  
23 balancing the Synergistic factors, because those factors are  
24 not a part of this trial, and they're not a part of this trial  
25 because plaintiff sought to exclude them from this trial.

1 That was the entire premise of its motion for disgorgement  
2 hearing. So the plaintiff shouldn't get the benefit of the  
3 consideration of those other remedies where they themselves  
4 sought to exclude those remedies.

5 The fourth factor is unreasonable delay on the  
6 plaintiff's part. Here, the plaintiff, you will hear, brought  
7 first an action in the USPTO. That action did not involve a  
8 request to stop using the mark. It did not involve a request  
9 concerning likelihood of confusion. Years passed. They found  
10 out what our sales were and then they filed a federal action.

11 So there are a period of years between the discovery  
12 of knowledge of the alleged infringement and their decision to  
13 seek disgorgement of profits. That period of years is  
14 relevant to the Synergistic analysis.

15 The fifth factor is the public interest. Here,  
16 despite a finding of a likelihood of confusion at the summary  
17 judgment stage, there has been no finding and there's no  
18 evidence of any actual confusion. There isn't any evidence of  
19 a single consumer who ever mistakenly purchased a Wal-Mart  
20 grill believing it to be a Variety grill or vice versa. That  
21 is relevant to the question of whether the public has been  
22 harmed, because a trademark concerns in part the degree to  
23 which the public is harmed. And there's no evidence in this  
24 case that the public has been harmed.

25 There is evidence -- and it's in the summary judgment

1 decision -- concerning issues of a likelihood of confusion,  
2 but that tells us nothing about the presence of actual  
3 confusion.

4 Now, the final factor is whether there's a question  
5 of palming off. Palming off in trademark parlance is a term  
6 of art. It means that Wal-Mart had sold its products as  
7 Variety's products. You won't hear any evidence to that  
8 effect. This is not a case of palming off.

9 Contrary to Variety's contention, the Synergistic  
10 factors are not in their favor. The Synergistic factors are  
11 in Wal-Mart's favor. And where it may be the case that an  
12 injunction is adequate relief, equity does not allow for the  
13 disgorgement of profits.

14 Given these facts, the Court should find that it's  
15 inequitable to disgorge Wal-Mart's profits. But even if the  
16 Court finds that disgorgement is proper under the Synergistic  
17 factors, disgorgement of Wal-Mart's profits is limited by the  
18 question of whether the mark is responsible for Wal-Mart's  
19 sales.

20 If defendant can show, and we will show in this  
21 trial, that the sales of its products were due to its own  
22 reputation, product, quality, price, features and not the  
23 name, then there's no basis for disgorgement. Because it  
24 doesn't matter whether the profit that Wal-Mart accrued was  
25 \$100 million or \$10 million or \$1 million. If it's the case



1 that the product was not purchased due to the name, there's no  
2 entitlement to disgorgement under the law. And that comes to  
3 us from a Supreme Court case called Mishawaka, 316 U.S. 203.

4           There, the Supreme Court said, "The plaintiff, of  
5 course, is not entitled to profits demonstrably not  
6 attributable to the unlawful use of his mark."

7           So the question of whether Wal-Mart's sales are  
8 attributable to the use of the word "Backyard" is a critical  
9 legal question in this case. And the evidence that the Court  
10 will hear will demonstrate that the mark is not the reason why  
11 the product sold.

12           You'll hear from Dr. Kent Van Liere who is a survey  
13 expert. Dr. Van Liere conducted a survey that was not at  
14 issue in the summary judgment phase of this case, a survey  
15 that concerns what it is that consumers consider to be  
16 important in their decision-making in deciding whether to  
17 purchase these products.

18           He tested these actual products and what they look  
19 like. And he asked them: What are the things in this product  
20 that cause you to want to buy it? When he did the study, the  
21 name was last. It has no value. It doesn't cause them to buy  
22 the product.

23           And why is that? It makes sense. You're going to  
24 hear testimony to the effect that these products at Wal-Mart  
25 are at what's called the opening price point. They're the

1 good quality product. They're low-cost products. They're  
2 products that a customer will typically go into the store and  
3 just want to buy a grill, not a particular grill.

4 And you're going to hear testimony that brand may  
5 matter, but it matters at higher price points. If someone is  
6 looking to buy a famous national brand like Weber, it matters.  
7 If someone's looking to buy an inexpensive grill or grilling  
8 accessory, it doesn't. And that's what Dr. Van Liere's survey  
9 will show.

10 In addition to Dr. Van Liere and his expert  
11 testimony, you'll hear from several Wal-Mart fact witnesses.  
12 Those fact witnesses will offer facts that completely align  
13 with the results of Dr. Van Liere's survey.

14 Among those fact witnesses, you will hear from  
15 Marvin Deshommes. He was in charge of the name selection and  
16 branding process. He'll testify that before launching the  
17 product with the brand, Wal-Mart did research among its  
18 consumers. This was before the product went to market. That  
19 research shows that consumers don't choose the product based  
20 on the name. They choose the product based on value,  
21 features, not brand name.

22 You'll also hear from Ms. Karen Dineen, who's a  
23 25-year employee of the company and a senior marketing  
24 employee. She was involved in this branding project. She  
25 will testify about the fact that that research told the

1 company that the thing that matters in selling these products,  
2 how we're going to be successful is we need to tout on the  
3 packaging the product features. We need the packaging to say  
4 to the consumer what it is, not who it is, meaning that the  
5 trademark doesn't matter.

6 And you'll see, when we go through with Ms. Dineen  
7 and others, the brand manual for these products, that the name  
8 Backyard is tiny. And on the product themselves, red on  
9 black, you have the features and the items' names because that  
10 was the point of this rebranding exercise.

11 You'll hear from Mr. Ortiz, who I just introduced.  
12 He's in charge of the grilling category. He's going to tell  
13 us that in January of this year, the company removed the word  
14 "Backyard" from the products. So the very same products were  
15 on the shelves in the very same stores with Backyard taken  
16 off. Sales did not go down.

17 What does that tell us? The presence or absence of  
18 the name means nothing. The name is not what causes the  
19 products to sell. So the use of the name isn't driving the  
20 sales, which means the profits are not attributable to the  
21 mark.

22 You're going to hear from Matt Kovach. Matt Kovach  
23 is a buyer at Wal-Mart. He's the one responsible for going to  
24 various suppliers and identifying the goods that the company  
25 is going to sell to its customers.

1           And he's going to tell us how it is that he decides  
2 what he's going to buy and what his process is for determining  
3 what it is he's going to buy. He's going to tell us that he  
4 has to have a very fine and acute understanding of what  
5 Wal-Mart customers are looking for in order to know what to  
6 buy. And he has a decision tree that he relies on in making  
7 purchases on behalf of the company.

8           And the things that matter on that decision tree, the  
9 things that he relies on in purchasing what he will tell you  
10 is more than a billion dollars' worth of product at retail:  
11 Value, features, things of that nature. He doesn't consider  
12 brand.

13           And he'll also tell you that he created sales  
14 forecasts upon which he went and purchased product at  
15 wholesale and from suppliers. After the name came off, he  
16 didn't change his forecasts because he knew Wal-Mart was going  
17 to sell as many or more products without the name because the  
18 name didn't mean anything as it relates to sales.

19           Importantly, we're not going to hear any evidence on  
20 these issues from Variety. We're only going to hear that it  
21 must be the case that the sales were attributable to the use  
22 of the mark. Why else would you use the mark? Why else would  
23 you not have taken the mark off upon our complaint? We're  
24 going to hear from Mr. Ortiz, and he's going to tell us the  
25 answer to that.

1 Wal-Mart is a huge ship. It's an ocean liner. If it  
2 needs to turn course, it needs three miles and half an hour.  
3 It can't simply remove a name off of a product. It's in 4,000  
4 stores, and all those stores need to be supplied by way of a  
5 diffuse distribution network. It's complicated and expensive  
6 to change course.

7 So it has nothing to do with the fact that the brand  
8 had some potential value to the company. It had no value as  
9 shown by the facts I just described.

10 Finally, if the Court finds that some portion of  
11 Wal-Mart's profits are attributable to the use of the mark --  
12 and it doesn't have to be 100. It doesn't have to be zero. It  
13 can be somewhere in between. We contend it's zero. But if  
14 the Court finds that some portion of the sales and the profits  
15 are attributable to the use of the mark, you'll hear from  
16 Wal-Mart's expert, Graham Rogers. He's an M.B.A. from the  
17 University of Chicago. He's been a damages and IP valuation  
18 expert for his entire career. He has done a number of  
19 calculations based on Wal-Mart's sales that describe the  
20 difference between its revenue, its gross profit, and the  
21 deduction of certain variable costs.

22 Those variable costs get us to an incremental or  
23 contribution profit number. That is the profit that is  
24 related to the sale of an incremental product.

25 So he is going to make what are perfectly ordinary

1 deductions to bring us to a number. And that's nationwide.  
2 He's going to conduct a separate analysis that discusses why  
3 it is that we shouldn't be looking at profits nationwide.

4 As the Court is aware, Variety sells its products in  
5 16 Mid-Atlantic and Southeastern states. It doesn't sell over  
6 the Internet. So its sales are limited to its brick and  
7 mortar presence. It is inequitable if the Court were disgorge  
8 profits in regions where Variety doesn't sell goods.

9 What's important is that Variety concedes in its  
10 papers that consumers, let's say, in California never even had  
11 an opportunity to be confused because they're not in that  
12 market. So if you look at docket entry 248, Variety states  
13 that consumers outside of Variety's selling area "never would  
14 have had the opportunity to be confused."

15 That being the case, in those geographic areas where  
16 Variety does not sell its goods, there's no basis for the  
17 Court to conclude that those sales by Wal-Mart are in any way  
18 even possibly attributable to use of the mark, because the  
19 consumers in those regions know nothing about the variety  
20 mark. And that's not contested.

21 So what Mr. Rogers does is he looks at the 16 states  
22 that Variety sells in. He excludes from his sales  
23 calculations and revenue calculations the remaining states to  
24 arrive at a number that reflects Wal-Mart's sales and profits  
25 in the 16 overlapping states.

1           Now, you'll hear from Mr. Rogers that, in addition to  
2 that state-by-state geographic analysis, he dug a little  
3 deeper. Because when he looked at Indiana and Florida and he  
4 looked at where the Variety stores were actually located,  
5 those stores are in remote areas of large states. And it  
6 makes no sense to assume that consumers who are several hours  
7 or some distance away from those stores would have ever heard  
8 of Variety's mark.

9           So he does an analysis where he did a 25-mile radius  
10 around all of Variety's stores, and he identified 1,166  
11 Wal-Mart stores within that 25-mile radius. And he did a  
12 further geographic calculation of the sales and the profits in  
13 that area. Now, what's important there is that this is a case  
14 that's a mix of federal registration rights for Variety on  
15 retail services. It only has common law rights for its retail  
16 goods trademarks.

17           What does that mean? That means that their ability  
18 to exclude others is limited by their actual market  
19 penetration in the marketplace. We contend that on that  
20 narrow geographic question, it's actually the plaintiff's  
21 burden to present evidence on their market penetration.

22           Finally, Mr. Rogers will opine that in determining a  
23 profit figure, he ultimately needs to consider the  
24 apportionment question, the question of the degree to which  
25 the mark influences the profits. When he does that, relying

1 on Dr. Van Liere's consumer survey, he will tell us that his  
2 opinion is disgorgement should be zero.

3 THE COURT: Do you want to say anything now?

4 MR. ADAMS: I do, your Honor.

5 THE COURT: I'd like to get into the trial. That's  
6 the kind of judge I am. You can waste as much time, both  
7 sides, as you want. But then you'll wear me out.

8 OPENING STATEMENT

9 MR. ADAMS: Your Honor, I'll be brief. There is one  
10 more point I want to make, though.

11 Your Honor, basically, Wal-Mart's position is that --  
12 and they cite this Mishawaka case because there's no direct  
13 evidence that Variety's sales were impacted by the  
14 infringement that they get a pass. Unfortunately, the  
15 Mishawaka case is not the case your Honor needs to pay  
16 attention to.

17 Why? Because Mishawaka was a case that involved  
18 nonwillful infringement. And even there, the Supreme Court  
19 says the District Court had erred in not requiring the  
20 defendant to disgorge profits. And there was a dissent by  
21 three of the justices who said, well, we can understand -- we  
22 agree that, if the infringement had been willful, they should  
23 have been disgorged. And they said but in a case where it  
24 wasn't willful, perhaps they shouldn't be. So Mishawaka is  
25 not the case that is relevant here.



1           The case the Court needs to pay attention to is the  
2 Hamilton-Brown Shoe case, which is cited in Mishawaka. And  
3 that was a case where the infringement was willful.

4           I think it's worth reading just a bit from the  
5 Hamilton-Brown opinion, which I think will clarify the point.  
6 This is a Supreme Court case.

7           "A sufficient reason for not requiring complainant in  
8 the present case to make an apportionment between the profits  
9 attributable to defendant's use of the offending mark and  
10 those attributable to the intrinsic merit of defendant's shoes  
11 is that such an apportionment is inherently impossible.  
12 Certainly, no formula is suggested by which it could be  
13 accomplished. The result of acceding to defendant's  
14 contention therefore would be to deny all compensation to  
15 complainant." This is the important language. "And it is to  
16 be remembered that the defendant does not stand as an innocent  
17 infringer. Not only do the findings of the court of appeals,  
18 supported by abundant evidence, show that the invitation of  
19 complaint's mark was fraudulent, but the profits included in  
20 the decree are confined to such as accrued to defendant  
21 through its persistence in the unlawful simulation in the face  
22 of the very plain notice of complainant's rights. In sales  
23 under a simulated trademark, it is impossible to decide how  
24 much of the profit resulted from the intrinsic value of the  
25 commodity in the market and how much from the credit given to

1 it by the trademark. In the very nature of the case, it would  
2 be impossible to ascertain to what extent it could have  
3 affected sales and at what prices, except for the use of the  
4 trademark."

5 "No one will deny that, on every principle of reason  
6 and justice, the owner of the trademark is entitled to so much  
7 of the profit as resulted from the use of the trademark."

8 Now, that case has been cited in a number of more  
9 recent cases. And a good example is the W.E. Bassett case.  
10 This was a case where the plaintiff was not even itself using  
11 the trademark on the goods that Revlon, the defendant, was  
12 using it on.

13 Here's what the court said there.

14 "Nevertheless, Revlon was found to have deliberately  
15 and fraudulently infringed Bassett's mark; and as indicated  
16 above, we agree with that finding. Accordingly, a full  
17 accounting is proper as a deterrent. And since Judge Frankel  
18 did find deliberate infringement, he should have granted  
19 Bassett an accounting for all of Revlon's profits on the  
20 'Cutti-Trim' items, not just on those sold after the  
21 preliminary injunction."

22 "It is essential to deter companies from willfully  
23 infringing a competitor's mark, and the only way the court can  
24 fashion a strong enough deterrent is to see to it that a  
25 company found guilty of willful infringement shall lose all

1 its profits from its use of the infringing mark."

2 That case was cited by a later case, Truck Equipment  
3 Service, and it refers to the Second Circuit opinion. A  
4 distinguished panel of the Second Circuit had occasion to  
5 consider to the extent profits should be recovered in this  
6 kind of case in W.E. Bassett.

7 "There, Revlon unilaterally determined that it could  
8 trade upon the goodwill of a competitor by coupling the  
9 latter's trademark with its own name and reputation in the  
10 manufacture and sale of a cuticle trimmer. Notwithstanding  
11 the fact that this infringement did not cause consumer  
12 confusion because a competitor was not manufacturing a similar  
13 product and that Revlon's sales were not therefore  
14 attributable to the unlawful conduct and accounting of all  
15 Revlon's profits was required because it is essential to deter  
16 companies from willfully infringing a competitor's mark, and  
17 the only way the courts can fashion a strong enough deterrent  
18 is to see it to that a company found guilty of willful  
19 infringement shall lose all profits from its use of the  
20 infringing mark."

21 Now, as regards to the Synergistic factors, the Court  
22 may want to look in due course at Wal-Mart's motion, its own  
23 motion for summary judgment in this case, which, of course,  
24 the Court denied.

25 And beginning on page 25 of Wal-Mart's brief, it

1 discusses at length each of the Synergistic factors, including  
2 willfulness, diversion of sales, all of them. I think it's  
3 fair to say that the Court inherently refused or denied  
4 Wal-Mart's position on the Synergistic factors in discussing  
5 them as it did in the summary judgment order and granting  
6 summary judgment in Variety's favor and not in Wal-Mart's.

7 Now, as far as the witnesses are concerned, Wal-Mart  
8 has said that it intends to bring 10 witnesses to this case.  
9 Most of those witnesses were not identified to Variety until  
10 after the close of discovery. Three of the witnesses that  
11 you've heard Mr. Puzella mention were never in Wal-Mart's  
12 initial disclosures until the initial disclosures they filed  
13 several months after discovery ended.

14 Furthermore, as far as we can tell, each of these  
15 witnesses is going to offer testimony, but without the  
16 production of any documents relating to their testimony.

17 So we have nothing, for example, from Mr. Deshommes  
18 that will either verify or contradict whatever testimony he's  
19 going to give. The same is true for Mr. Ortiz.

20 Wal-Mart tried to take depositions long after  
21 discovery in this case ended, and your Honor correctly denied  
22 their motion to do so. That's the basis on which we filed our  
23 motion in limine.

24 It's simply unfair, particularly in a case like this,  
25 for Wal-Mart to drag out the discovery process and then after

1 the discovery period is over to file what they refer to as  
2 initial disclosures with the names of individuals that they  
3 had never before disclosed and had never indicated were going  
4 to testify in this case.

5 The final point I'll simply make is this. The  
6 Trademark Office maintains a register, and it's used to record  
7 trademarks so that those later searching to determine the  
8 availability of a trademark will have an authoritative,  
9 nationwide place to go find information regarding the rights  
10 of prior users. As such, it provides a means for warding off  
11 infringers by providing information to those later users.

12 Wal-Mart's treatment of the trademark register has  
13 been quite different. Instead, Wal-Mart treats the trademark  
14 register as sort of a superstore, where it can go shopping for  
15 trademarks and runs up and down the aisles looking for  
16 trademarks that it might want to use. And if it decides to do  
17 so, it simply does so. And why? Because Wal-Mart, as you  
18 heard Mr. Puzella say, is so big that no one could rationally  
19 argue they would have made all of Wal-Mart's sales if Wal-Mart  
20 had not.

21 So Wal-Mart's position, in a nutshell, is that we're  
22 big enough to where the rules that apply to everyone simply  
23 don't apply to us. We get to use whatever trademarks we want  
24 to. We get to use them as long as we want to, how we want to.  
25 And if we never get around to stopping, too bad. The

1 trademark owner is out of luck. We walk away not owing a  
2 penny and we go on to our next infringement.

3 If Wal-Mart's position were correct, the trademark  
4 laws would be stood on their head. Instead of a legal  
5 framework to protect trademark rights, it would become a  
6 clearinghouse for trademark infringers where they can go to  
7 shop for the next infringement.

8 So those are the basic points on behalf of Variety.

9 Mr. Puzella asked at the beginning of his comments  
10 whether we rested, and we do, because we rely on the Court's  
11 summary judgment order in this case. We rely on Wal-Mart's  
12 own admissions in their own motion for summary judgment, which  
13 was denied, as to the basic facts in this case.

14 The burden in this case is on Wal-Mart to show what  
15 should be deducted, if anything, from their gross revenue.  
16 That's their burden, and we are here to hear what they have to  
17 say.

18 THE COURT: If you have procedural objections to  
19 witnesses, raise those as the witness is presented.

20 MR. ADAMS: We will, your Honor.

21 THE COURT: All right. Call your first witness.

22 MR. HOSP: Thank you, your Honor. David Hosp for  
23 Wal-Mart. We're going to call Dr. Kent Van Liere as our first  
24 witness.

25 Now that the plaintiff has rested, we want to put on

1 the record that we are moving for a directed verdict based on  
2 the fact that the plaintiff has not actually shown causation  
3 which is absolutely required under the UDTPA as well as under  
4 the Lanham Act.

5 THE COURT: It's been so long, you'll have to correct  
6 me or help me. A directed verdict, when I was a young lawyer,  
7 was always in a jury case. A Rule 41(b) or (c) motion was the  
8 appropriate one in a nonjury case, wasn't it?

9 MR. HOSP: My apologies, your Honor. You are  
10 correct.

11 THE COURT: Have they changed the law on me?

12 MR. HOSP: They have not.

13 THE COURT: Well, that's a comfort.

14 Denied.

15 MR. HOSP: Thank you.

16 Your Honor, we call Dr. Kent Van Liere.

17 Your Honor, to streamline the process, what we have  
18 done is we've prepared binders with exhibits for your Honor  
19 and opposing counsel. The Court and the other side have the  
20 documents, but this will make the process far easier.

21 THE COURT: That's fine. Hand those up.

22 (Witness sworn.)

23 KENT VAN LIERE, DEFENDANT'S WITNESS, SWORN

24 DIRECT EXAMINATION

25 BY MR. HOSP:

1 Q. Good morning. Would you please introduce yourself to the  
2 Court.

3 A. Yes. I'm Kent Van Liere.

4 Q. And have you been retained as an expert in this  
5 litigation?

6 A. Yes, I have, by Wal-Mart.

7 Q. What were you asked to do?

8 A. So basically what I was asked to do is design a study to  
9 measure the relative importance of various -- excuse me.  
10 That's a little loud. To design a study of the relative  
11 importance of various attributes in consumer's decision to  
12 purchase grills and grill products if they were going to  
13 purchase them through Wal-Mart and, in particular, the  
14 relative importance of The Backyard Grill brand.

15 Q. Now, just to be clear, is this the same thing as testing  
16 for commercial strength?

17 A. No, not as I understand it.

18 Q. Can you explain what the difference is.

19 A. So, your Honor, I'm not a judge and I'm not a lawyer.

20 THE COURT: I'm not an expert.

21 BY THE WITNESS:

22 A. As a survey expert, I understand commercial strength in  
23 the trademark context to mean the source identifying  
24 properties of a mark or trade dress, and the strength of it is  
25 the degree to which consumers associate a mark or trade dress



1 with a single source. Whereas, what I was asked to do was  
2 measure the relative importance of the brand in the decision  
3 to purchase these products. So it's a different kind of  
4 study.

5 In a commercial strength, we would do secondary,  
6 meaning surveys or dilution surveys or fame surveys. Here, we  
7 did something a little different than that.

8 THE COURT: I wonder how much an expert has to  
9 contribute to an issue that really calls for just plain old  
10 common sense. What you're doing is going around asking  
11 ordinary people what makes up your mind, and those of us who  
12 have any common sense, hopefully, would come up with the same  
13 answers. And you only need an expert when it's something  
14 that's involved or mysterious to the ordinary mind.

15 Anyway, go ahead.

16 BY MR. HOSP:

17 Q. Do you have any particular expertise in this area to  
18 conduct this research?

19 A. Yes. I'm generally qualified in the courts as a survey  
20 expert, so that's what I'm acting as.

21 Q. Let's talk a little bit about your education and  
22 experience.

23 Can you first describe your educational background as  
24 it pertains to your expertise.

25 A. Basically, I have a BA and a master's degree in sociology

1 and a Ph.D. in sociology from Washington State University.

2 And I specialize in survey, methodology and statistics.

3 Q. Very briefly, can you describe your work experience as it  
4 relates to your expertise in this area.

5 A. Sure. After graduate school, I taught for seven years as  
6 a professor at the University of Tennessee, where I taught  
7 survey, methodology and statistics, among other things.

8 For about the next 20 years, I was either a principle  
9 or president of three market research firms that primarily did  
10 commercial market research for large corporations and large  
11 government agencies.

12 And then for about the last dozen years, I've been  
13 doing survey work related to litigation.

14 Q. Okay. And has your survey work been admitted in courts  
15 before?

16 A. Yes, on many occasions.

17 Q. Has it been excluded from courts before?

18 A. No, I have not had any excluded.

19 Q. If you turn to Exhibit D167 in your binder, would you  
20 identify what that is?

21 A. This appears to be a copy of my CV that was complete as of  
22 March 2016.

23 MR. HOSP: Your Honor, at this time we offer  
24 Dr. Van Liere as an expert in survey methodology.

25 THE COURT: I'll reserve a ruling on that. What is

1 it, Daubert? Is that the case?

2 MR. ADAMS: Correct, your Honor.

3 THE COURT: Hello? Who knows?

4 MR. ADAMS: Daubert, your Honor, is the Supreme Court  
5 case by which the Supreme Court decided that the District  
6 Court should be the gatekeeper and determine whether or not  
7 the survey methodology met a --

8 THE COURT: It's about experts.

9 MR. ADAMS: Yes.

10 THE COURT: I'm just referencing it. I don't know.  
11 I mean, I'll wait and hear argument on it. I mean, I'll let  
12 you give your testimony. But whether or not I need it is  
13 something that I'm not prepared to decide right now.

14 MR. HOSP: Thank you, your Honor.

15 BY MR. HOSP:

16 Q. Dr. Van Liere, based on your expertise and the surveys  
17 you've performed in this matter, have you drawn any  
18 conclusions about the degree to which The Backyard Grill marks  
19 drives demand for grills and grill accessories at Wal-Mart?

20 A. Yes, I have.

21 Q. What is that conclusion?

22 A. Basically, based on the study we did, and perhaps in line  
23 with common sense, the results of the survey show that  
24 The Backyard Grill brand, when considered among other  
25 attributes that consumers might consider making purchase

1 decisions, is relatively unimportant in their decision to  
2 purchase these products and is no more important than a  
3 fictitious brand that was made up and used in the control  
4 condition. So, basically, the results suggest the brand is  
5 not driving demand for the product.

6 THE COURT: Suppose the vendor has a monopoly in the  
7 market, it wouldn't matter whether the brand was black, red,  
8 white, purple, green. If you have a monopoly, then you're the  
9 only store in town. If it's a company town in the coal mines,  
10 then you don't get to go buy milk somewhere else, right?

11 THE WITNESS: It's possible. There's a variety of  
12 considerations that go into decisions to purchase these  
13 products.

14 THE COURT: I mean, if you had a pure monopoly and  
15 you were the only vendor, then everything could have a blank  
16 label on it and they'd still sell it.

17 THE WITNESS: That may be true. It may also go to  
18 the relative importance of the brand in those decisions to  
19 purchase those products.

20 THE COURT: Okay.

21 BY MR. HOSP:

22 Q. At a high level, can you describe the surveys that you did  
23 to come to that conclusion?

24 A. Yes. Basically, we did two online surveys, one nationally  
25 and one in the 16-state region. The surveys were designed to

1 screen to a particular relevant population. We showed them  
2 images of grill products, and then we asked them to tell us  
3 about what was important in their decisions to purchase those  
4 kinds of products.

5 Q. From the methodological standpoint, what's the difference  
6 between the two surveys that you performed?

7 A. So the basic difference was the geography. As part of  
8 this matter, I understood an issue arose of whether a national  
9 survey was appropriate or whether it should be a regional  
10 survey. So the first survey was done nationally and the  
11 second survey was done in the Southeast region of the  
12 16 states and D.C. But, otherwise, the two surveys are  
13 identical.

14 THE COURT: Do you sell more grills in the Southeast  
15 than you would in the Northwest or North, like South Dakota  
16 and Minnesota?

17 THE WITNESS: I don't know the specific answer to  
18 that question. I understood the reason had to do with the  
19 appropriate base to consider for purposes of damages.

20 BY MR. HOSP:

21 Q. And within those different geographies, how did you define  
22 the relevant universe of the respondents to interview?

23 A. The basic idea here was to measure the perceptions of  
24 consumers who would be in the market to purchase grills or  
25 grill products.

1 THE COURT: How many people are there in America?  
2 315 million or 318 million?

3 THE WITNESS: I don't know the exact number,  
4 your Honor.

5 THE COURT: You don't?

6 THE WITNESS: Something like that.

7 THE COURT: Will you believe me?

8 THE WITNESS: Generally.

9 THE COURT: How many of the consumer-age people in  
10 America have shopped at Wal-Mart at least once in their life?

11 THE WITNESS: I don't know that specific number.

12 THE COURT: 200 million? 250 million?

13 THE WITNESS: Perhaps.

14 THE COURT: You don't have any idea?

15 THE WITNESS: I'd be speculating to say.

16 THE COURT: Okay.

17 BY MR. HOSP:

18 Q. What were the respondents shown? What were the stimuli  
19 for the survey?

20 A. Basically, what we did then is we identified a series of  
21 Wal-Mart grill products and grill accessories, and we showed  
22 respondents three different grill products if they said they  
23 were in the market to purchase grills in the next year, or we  
24 showed them a three-in-one brush accessory product if they  
25 said they were in the market to purchase accessories in the

1 next year and would consider purchasing them at Wal-Mart.

2 Q. With respect to the test cell, what was the name that was  
3 on the stimulus for those?

4 A. So the products, the three that we tested, were Backyard  
5 Grill products that have the brand that's at issue.

6 Q. And you used a control as well?

7 A. Yes, we did.

8 Q. Explain very briefly what the purpose of the control is.

9 A. Basically, when you do one of these kinds of studies, you  
10 go out and you survey people and show them a test stimuli --  
11 here, the images of the grill product -- and you ask them  
12 questions about.

13 But an issue arises in surveys about whether the  
14 amount of perception you measure in the test is just due to  
15 the fact that we did a survey or people are guessing or  
16 they're otherwise affected by their preexisting beliefs in a  
17 certain way.

18 THE COURT: Are these gas grills or charcoal grills?

19 THE WITNESS: The particular grill we used were  
20 three. Was a four-burner gas, one was a combined gas and  
21 charcoal, and one was a small charcoal-only grill.

22 THE COURT: Okay.

23 THE WITNESS: The idea of the control is that it  
24 should be as similar as possible to the test but with the one  
25 thing that's at issue being different. So here we changed the

1 mark or the brand on the control grills to Barbecue Grill from  
2 Backyard Grill. So that allows us to see how much difference  
3 there is between the Backyard Grill mark that's at issue and a  
4 neutrally worded fictitious brand in the control condition.

5 BY MR. HOSP:

6 Q. To illustrate, if you turn to Exhibit 169 in your binder,  
7 can you tell me what that is?

8 A. Yes. So 169 is just the set of web page images that  
9 respondents saw for each of three grills types and the  
10 accessories from Wal-Mart. And then the control products,  
11 which are identical, but with the brand name changed.

12 MR. HOSP: Your Honor, I offer D169 into evidence.

13 THE COURT: Received.

14 (Defendant's Exhibit 169 received.)

15 BY MR. HOSP:

16 Q. If you would please turn your attention to Exhibit D170 in  
17 your binder.

18 A. I see that.

19 Q. Do you recognize this document?

20 A. Yes. So this is just a copy of the actual survey  
21 questions that we used.

22 MR. HOSP: Your Honor I move D170 into evidence.

23 THE COURT: Received.

24

25



1 (Defendant's Exhibit 170 received.)

2 BY MR. HOSP:

3 Q. Can you just at a high level walk through this survey.

4 Let's start -- without getting into the details, the first  
5 part of the survey is a screener survey, correct?

6 A. That is correct.

7 Q. Can you explain what the purpose of that is?

8 A. The way this works is a random sample of consumers in the  
9 online panel we used were sent an invitation to do the survey,  
10 but we want to screen to people that we had a specific set of  
11 criteria. Here, people who were in the market to purchase  
12 grills or grill accessories in the next year and would  
13 consider purchasing them through Wal-Mart.

14 So the beginning questions are the screening  
15 questions and some quality control questions.

16 Q. And just to save time, with respect to the procedures that  
17 were done in the screening, were those done in accordance with  
18 the Manual for Complex Litigation?

19 A. Yes. The procedures we use both for sampling and survey  
20 implementation were the generally accepted procedures for  
21 surveys used in litigation.

22 Q. Was that true of the interviewing techniques as well?

23 A. That's correct.

24 Q. Was that true of the process you used to collect and  
25 tabulate the results?

1 A. Yes.

2 Q. Let's turn, if you would, to the fourth page of this,  
3 which is the substantive survey.

4 Can you walk us through how exactly the survey was  
5 conducted?

6 A. Basically, once you had qualified in, you were read a  
7 transition screen and then you were shown one or more, one at  
8 a time, of the actual grills or the grill accessory product.  
9 And you were randomly assigned to see either the test version  
10 of it or the control version of it.

11 After you had reviewed it, you were then shown a list  
12 of attributes. They were actually tiles. And you were asked  
13 to drag them into a box that said either this makes me more  
14 likely to purchase the product, less likely to purchase the  
15 product, or it has no effect.

16 So respondents first went through and identified for  
17 us which factors made them more likely to purchase the  
18 product. And then after they completed that, a second  
19 exercise, they were reshown the list that they had said made  
20 them more likely to purchase the product, and they were asked  
21 to allocate 100 points to that.

22 That's our way of measuring the relative importance  
23 to the respondent of the subset that they said made them more  
24 likely to purchase the product. So that was the basic  
25 exercise we did to measure relative importance of various

1 attributes.

2 Q. If you would take a look at Exhibit D171 in your binder.

3 A. I see that.

4 Q. Can you identify what that is?

5 A. Yes. This appears to be the data that was the actual data  
6 for the answers for the 605 respondents who were in the  
7 initial survey.

8 MR. HOSP: Your Honor, I offer D171 into evidence.

9 THE COURT: Received.

10 (Defendant's Exhibit 171 received.)

11 MR. SHAW: Objection. Lack of foundation.

12 THE COURT: What's that?

13 MR. SHAW: Lack of foundation of the exhibit.

14 THE COURT: Overruled.

15 BY MR. HOSP:

16 Q. If you would --

17 THE COURT: What grills were actually for sale?

18 There's some brand names like Weber and Char-Grill, and those  
19 are premium brands, and then The Backyard was for sale. Was  
20 there one below that? Was there a generic, just hot grill or  
21 Wal-Mart grill, or was The Backyard the bottom line?

22 THE WITNESS: I don't remember all the pricing. For  
23 the three grills that we tested, which were among the best  
24 selling of the grills through Wal-Mart for The Backyard Grill,  
25 one, the charcoal, was like \$39; the combined charcoal gas

1 was --

2 THE COURT: 99?

3 THE WITNESS: Well, about 148; and I think the  
4 four-burner grill was 198. So we had a range of prices.

5 THE COURT: Did they have the equivalent product  
6 lower in the market?

7 THE WITNESS: I don't specifically recall.

8 THE COURT: Okay. You don't know?

9 THE WITNESS: I don't know as I sit here right now.

10 THE COURT: They didn't have something that said  
11 cheap grill that was 29.99, 99.99, and 129.99?

12 THE WITNESS: Yes, I don't specifically remember if  
13 there was another set below that.

14 THE COURT: Just below the mark.

15 THE WITNESS: I don't recall.

16 BY MR. HOSP:

17 Q. If you would, turn to Exhibit D178 in your binder.

18 A. Yes, I see that.

19 Q. Can you identify what that is?

20 A. Yes. So this is basically the same exact set of  
21 questions, and it's the survey data for the supplemental  
22 survey that we did of 300 additional respondents in the  
23 16-state region.

24 MR. HOSP: Your Honor, I move D178 into evidence.

25 THE COURT: Received.

1 (Defendant's Exhibit 178 received.)

2 BY MR. HOSP:

3 Q. Did you compile the data that's represented in D171 and  
4 D178 into tables for analysis?

5 A. Yes, I did.

6 Q. If you would, turn to Exhibits D270 and D271.

7 A. I see those.

8 Q. Can you identify what those documents are?

9 A. Yes. D270 is a set of eight tables that summarizes the  
10 results of the two exercises I described for the national  
11 survey. And D271 is a table that summarizes the results with  
12 respect to the brand specifically for the original study, the  
13 subgroup in the original study that were in the 16-state  
14 region, and then the results for the supplemental survey for  
15 the 16-state region.

16 Q. Okay. If you would look at Table 2 on D270, could you  
17 just explain what information is conveyed in this table?

18 A. Yes. So the first exercise you'll remember is we asked  
19 respondents to indicate whether a feature made them more  
20 likely to purchase the product. On the left side is a list of  
21 the features that were tested, and you can see in the title of  
22 the table that this is a summary for the four-burner gas  
23 grill.

24 What it's showing us is that, in the first two  
25 columns, out of the 229 test respondents that saw this

1 particular grill, the count of them and the percent of them  
2 that indicated each of these things made them more likely to  
3 purchase the product.

4 In the third and fourth columns is the same counts  
5 and proportions, but for the group of respondents who saw the  
6 control grill with Barbecue Grill as the brand name. And then  
7 the final column is just the difference between the two  
8 columns.

9 Q. Why is the difference important?

10 A. Basically, the thing we're looking for here is not only  
11 what's the level that consumers assign to the brand Backyard  
12 Grill, here you can see the highlighted row near the bottom,  
13 34 percent in the test indicated that made them more likely to  
14 purchase the product.

15 But what we also want to know is to what degree  
16 that's an artifact of our study. So we asked in the control  
17 the same question, and we see that the fictitious, neutrally  
18 worded brand that we used, Barbecue Grill, received almost the  
19 same percent.

20 So the difference between the two is telling us that  
21 the brand Backyard Grill is really not any more important than  
22 a fictitious, neutrally worded brand.

23 THE COURT: As between the nonproprietary national  
24 brands, like Weber and Char-Grill, and the proprietary brand  
25 that Wal-Mart has for sale, what's the distribution of

1 purchase? Is it like 75 percent of them are Backyard Grill,  
2 i.e., Wal-Mart grill, and the other 25 percent is split  
3 between Weber and Char-Grill? Because they make a far higher  
4 profit on their own proprietary piece of merchandise than they  
5 do on vending someone else's product.

6 THE WITNESS: I don't have a specific answer to that  
7 question.

8 THE COURT: But you see the point?

9 THE WITNESS: I had them look at the sales across the  
10 brand.

11 THE COURT: You see the point.

12 THE WITNESS: I do.

13 THE COURT: If the Wal-Mart shopper goes in and they  
14 have -- it's like gasoline. They have the 93 octane, the  
15 91 octane, and the 87 octane, 99 percent of them are going to  
16 fill up with the 87 octane. Is that the same in this  
17 distribution?

18 THE WITNESS: I don't know for certain.

19 BY MR. HOSP:

20 Q. Looking at the data that you just described in Table 2,  
21 what conclusion do you draw about the use of the name  
22 The Backyard Grill?

23 A. Well, the fact that only a third of respondents mention it  
24 as something that makes them more likely to purchase the  
25 product and the fact that the results are not very different

1 from a fictitious control brand, that tells us that the brand  
2 in the context of purchasing these kinds of grills is just not  
3 important in consumers' decisions to purchase those products.

4 Q. Now, Table 2 represents the data for the four-burner gas  
5 grill; is that right?

6 A. That's correct.

7 Q. Can you -- without going into a lot of detail, with  
8 respect to Tables 3, 4 and 5, can you describe what  
9 information is conveyed on those?

10 A. Yes. So, basically, 3, 4 and 5 are the exact same  
11 information but for the two other grill products and the grill  
12 accessory product, and the results generally are the same for  
13 across all of the four products.

14 Q. So what conclusions do you draw based on that data?

15 A. Generally, across the products we tested and therefore  
16 across the products generally, the brand Backyard Grill is not  
17 showing as particularly important in decisions that consumers  
18 make to purchase these products.

19 Q. If you look at Table 6 on D270, can you explain the  
20 information that's conveyed on that table?

21 A. Yes. So Table 6 then is the second exercise. So  
22 respondents were then asked to allocate points to the features  
23 that they said were important, and that's our way of measuring  
24 relative importance.

25 So they were asked to allocate 100 points. They were



1 asked to give more points to things that were more important  
2 and fewer points to things that were less important. Then  
3 what we did is we averaged the points that were allocated  
4 across the respondents.

5           So what you can see is, near the bottom, The Backyard  
6 Grill in the test and the Barbecue Grill in the control only  
7 get, on average, about 5 points allocated to them out of 100,  
8 and there's no substantial difference between the test and the  
9 control here. So it's an additional evidence that the brand  
10 is not particularly important among consumers in their  
11 decision to purchase these kinds of products.

12 Q. Okay. And, again, Table 6 deals with the four-burner gas  
13 grill. Can you describe what information is contained in  
14 Tables 7, 8 and 9?

15 A. So 7, 8 and 9, again, it's the same analysis of the data  
16 but for the other two grill types and for the grill accessory,  
17 and the results are very similar across all of the tables.

18 Q. Okay. If you would take a look at D271.

19 A. I see that.

20 Q. And can you describe what information is conveyed in that  
21 table?

22 A. Yes. So after the original work was done, I understand  
23 that an issue arose about whether or not the appropriate base  
24 was the 16 states and the District of Columbia. So I was  
25 asked to conduct a second supplemental study.

1           In addition, we went into the original data and found  
2 that set of respondents, 261 respondents, who were from the  
3 16 states and the D.C. area. And this Table 1 is summarizing  
4 the results for all four of the products for just the  
5 attribute brand in terms of the proportions that indicated  
6 that it made them more likely to purchase the product.

7           So, for example, the first row, you can see  
8 34 percent said that The Backyard Grill brand makes them more  
9 likely to purchase the product for the four-burner gas grill,  
10 and that's the same as the original study we just looked at.  
11 But it goes to 32 percent when we look at just the subset from  
12 the 16 states and D.C. And in the supplemental study, it was  
13 about 29 percent.

14           THE COURT: Did you ask the consumers whether they  
15 were more likely to purchase the grill if it said Backyard as  
16 opposed to saying Wal-Mart?

17           THE WITNESS: We didn't ask that exact question.

18           THE COURT: Why not?

19           THE WITNESS: Well, what we asked in the attribute  
20 list you'll see that sold at Wal-Mart is one of the attributes  
21 that we tested.

22           THE COURT: No. But in the market, if you had a  
23 product that's in a hierarchical setting and it says Wal-Mart  
24 and it's the cheapest thing you can touch and then you had one  
25 higher that said Backyard but it was also manufactured by

1 Wal-Mart, that would be an interesting comparison as to  
2 whether people were using Backyard rather than go for the dirt  
3 cheap, lowest, most economical thing, i.e., Wal-Mart.

4 THE WITNESS: Potentially.

5 THE COURT: But you don't know that?

6 THE WITNESS: I don't know that.

7 BY MR. HOSP:

8 Q. Based on the data that's contained in 271, what  
9 conclusions did you draw?

10 A. So basically the results of this suggested that for the  
11 16 states and the District of Columbia area, that the  
12 conclusions I drew in my original report would apply to those  
13 regions as well.

14 Q. Okay. Now, Dr. Van Liere, did you review a declaration or  
15 rebuttal report that was submitted by Robert Klein in this  
16 case that criticized your survey?

17 A. I did.

18 Q. Do you recall specifically what his criticisms were?

19 A. Generally, I recall that he had four broad criticisms.

20 Q. Well, let's take those one at a time.

21 How did you respond to Mr. Klein's criticism that  
22 your survey uses an overinclusive sample?

23 A. Basically, I understood Mr. Klein to be claiming that we  
24 should not have done a national study, that we should have  
25 done the study only in the 16 states and the D.C. area. At

1 the time I read that, I think he misunderstood the purpose of  
2 the study. It was my understanding that Variety was claiming  
3 damages on all U.S. sales and, therefore, the appropriate base  
4 for my study would be the influence of The Backyard Grill on  
5 consumers' decisions to purchase these products nationally,  
6 not just in the region. So I disagreed with his criticism in  
7 that regard.

8 Q. Setting aside whether or not his criticism had a basis,  
9 methodologically, did you do anything that addressed that  
10 criticism?

11 A. Yes. That, in part, is why I did the supplemental  
12 analysis of the data from the original study that was just  
13 collected in the 16 states and D.C. Additionally, I did the  
14 supplemental survey just in the 16 states using the same  
15 methodology.

16 Q. Did you find different results?

17 A. No. The results were generally the same.

18 Q. How do you respond to Mr. Klein's criticism that you used  
19 an improper stimulus?

20 A. Mr. Klein's criticism there, as I understood it, was that  
21 we used a web page as our stimulus to show respondents. So  
22 what we showed them was the actual Wal-Mart web page that  
23 would come up for these products if you went to search for  
24 them.

25 My response to that was no, I think the way we did it

1 was appropriate. We wanted the respondent to see an image of  
2 the product with the brand name, because we were testing the  
3 brand name and it's shown there, and the product features so  
4 that they could see a list of features.

5 And the way in which the web page works, it has the  
6 characteristic that you see the brand, you see the product and  
7 you see the features, which is what we were trying to test.  
8 Additionally, the web pages we used, they were actually  
9 Wal-Mart's web pages. So they are the actual information  
10 consumers would encounter in the marketplace if they were  
11 researching or looking at these products.

12 Q. Do you have any reason to believe that the results would  
13 be different in the store?

14 A. No, I don't believe they would be different, and Mr. Klein  
15 didn't do a study to show that.

16 Q. How do you respond to Mr. Klein's criticism that you used  
17 an invalid control group?

18 A. My understanding of the criticism there was that I should  
19 have used an actual brand name that's in the market for the  
20 control brand rather than a fictitious, neutrally worded brand  
21 name. Again, I completely disagree with that.

22 The idea here is not to test the relative importance  
23 of two brands that are in the marketplace but, rather, to test  
24 The Backyard Grill brand against a neutrally worded fictitious  
25 brand to see to what extent The Backyard Grill brand operates

1 more strongly than essentially a fictitious brand.

2 Q. How do you respond to Mr. Klein's criticism that you did  
3 not measure intent to purchase specifically?

4 A. Again, I think he misunderstood. The purpose of the study  
5 was to say among consumers who are in the market to purchase  
6 these types of products, how relatively important is  
7 The Backyard Grill brand and, in essence, is it driving demand  
8 for these products. So I think the appropriate pool of people  
9 there is people who are in the market. And we're trying to  
10 study the effect of the brand on their decisions to purchase  
11 those products.

12 Q. So having considered Mr. Klein's criticisms, did it change  
13 your opinions at all?

14 A. No. Nothing about his criticisms changed my opinions, nor  
15 do I believe my results are unreliable.

16 MR. HOSP: Thank you, your Honor. Nothing further.

17 THE COURT: Any cross?

18 CROSS-EXAMINATION

19 BY MR. SHAW:

20 Q. Good morning, Dr. Van Liere.

21 A. Mr. Shaw.

22 Q. Your sample of participants in this survey, that was not  
23 limited to only participants who were prior Wal-Mart shoppers,  
24 right? It was not limited to only those consumers who had  
25 previously shopped at Wal-Mart; that's correct, right?

1 A. There would be potentially respondents who had shopped at  
2 Wal-Mart, but the qualifying condition was whether you would  
3 consider purchasing these grill products through Wal-Mart.

4 Q. So, Dr. Van Liere, listen to my question.

5 Your survey was not limited to only participants who  
6 were prior Wal-Mart shoppers, was it?

7 A. It was not limited to people who had only shopped at  
8 Wal-Mart in the past, that's correct. It included people --

9 Q. Thank you.

10 Your sample was not limited to any particular  
11 consumers of a certain income level, was it?

12 A. It wasn't -- there was no defined income level, but they  
13 had to indicate that they would consider purchasing these  
14 products through Wal-Mart, which would put them in the  
15 category that would consider shopping at Wal-Mart.

16 Q. So the answer to my question was correct, it was not  
17 limited to any particular income level? You did not control  
18 for any restrictions on income level, correct?

19 A. It's controlled by asking whether you would shop at  
20 Wal-Mart.

21 Q. You were in the courtroom when Mr. Puzella gave his  
22 opening statement where he referenced that the consumers of  
23 this type of product would be the consumers that would just  
24 simply be walking into the store and effectively making an  
25 impulse purchase. Do you recall that?

1 A. I don't know that I heard that exactly. When he was  
2 speaking this way, we couldn't hear so good in the back.

3 Q. My question is, you did not limit the sample of  
4 participants in this survey to only consumers who would be  
5 making impulse purchases at Wal-Mart, correct?

6 A. Yes, we did not. We wanted people who were in the market  
7 to make these purchases, and it would include people who would  
8 consider the brands and people who would walk in and make  
9 purchases at whatever rate they're in that population.

10 Q. So, Dr. Van Liere, try to listen to my question so we can  
11 move through this a little quicker.

12 Your survey was not limited strictly to participants  
13 who would be of the sort that would be making impulse  
14 purchases at Wal-Mart, it wasn't limited to only that consumer  
15 segment, correct?

16 A. We didn't specifically screen for that population. They  
17 would be in my sample.

18 Q. Your survey was solely based on the Internet to measure  
19 consumer preferences, correct? It was an Internet-based  
20 survey?

21 A. Yes, we did. We collected the data on an online survey.

22 Q. Your survey -- in your survey, you assumed that the  
23 participants had access to computers, correct?

24 A. Yes.

25 Q. And the participants, I believe you testified, they saw



1 images of the products as part of the survey, but they did not  
2 have the opportunity in your survey to physically see the  
3 products live when they participated, correct?

4 A. Yes. As part of the survey process, they saw the images  
5 from the Wal-Mart web pages, that's correct.

6 Q. If I'm correct, you can just say correct.

7 You could have done a live survey, a live, in-person  
8 survey, but you didn't do that, correct?

9 A. We collected the data online. We didn't do this as an  
10 in-person or in-store survey, that's correct.

11 Q. But you and your team had the opportunity to see the  
12 products live, but your survey participants did not; is that  
13 correct?

14 A. Well, the survey participants have the ability to see the  
15 product and many of them may have seen the product. But as  
16 far as the way we collected the data, we showed them the  
17 images online.

18 Q. Let me ask it again.

19 You and your team saw the physical products live in  
20 stores, correct?

21 A. We did, yes.

22 Q. Your survey participants did not, correct?

23 A. No, that's not correct. You can't say it that way.

24 Q. As part of your survey, they were not allowed to be in the  
25 store and participate in the survey and see the products live.

1 It was an Internet survey, right?

2 A. That, I agree with.

3 Q. So if you had conducted an in-person, live survey,  
4 participants would have been allowed to see the products that  
5 were actually placed in the stores, correct?

6 A. Well, the images they see in our study are the products  
7 that are in the stores. It's just we're not showing them to  
8 them in the store.

9 Q. The participants in your survey were not allowed to  
10 physically see the products as they were placed in the store  
11 because they were conducting the survey online, right?

12 A. I'm going to agree that we did not collect the data in the  
13 stores.

14 Q. And had the data been collected in the stores, the  
15 participants would have seen the products physically placed in  
16 the store and questions would have been asked of the  
17 participants at some place, either in the store or outside the  
18 store, correct?

19 A. That would have been one potential way to collect the  
20 data, yes.

21 Q. And the physical placement of the products in the stores  
22 can have an impact on consumers' buying decisions in some  
23 circumstances, right?

24 A. Potentially, sure.

25 Q. In the Internet survey you conducted, about a third of the

1 participants noted that The Backyard Grill trademark makes  
2 them more likely to buy the product, right?

3 A. Yes, that's correct.

4 Q. And your methodology, you refer to it as the constant sum  
5 allocation, right?

6 A. Yes, not here, but in my deposition and the report, that  
7 point allocation is referred to in the methodology as a  
8 constant sum allocation.

9 Q. And as part of that methodology, you are assuming that the  
10 consumers or the potential consumers would make buying  
11 decisions based on processing the various attributes that are  
12 included in the survey, right?

13 A. They had the opportunity to include an "other" category.  
14 So if we missed something, they could say that. But, in  
15 general, what you're saying is correct.

16 Q. Sort of the premise of this is they select from the  
17 various attributes that are presented and then weigh the  
18 relative importance of the attributes, correct?

19 A. Yes, but with the condition that if we missed something,  
20 they're allowed to say "other" and allocate points to it.

21 Q. Fair enough.

22 Another methodology could have been to make the  
23 assumption that consumers are making about buying decisions by  
24 processing as to various brands. In other words, consumers  
25 might want to choose brand X over brand Y and brand Z over

1 brand C. That would be a different methodology that you did  
2 not do here, correct?

3 A. Well, we're measuring the relative impact of the brand  
4 Backyard Grill and a fictitious control brand. So that's what  
5 we did. We compared those two. We didn't test, for example,  
6 Weber grills or some other brand. I agree with that.

7 Q. Your survey did not include an analysis of five to six  
8 different brands that consumers may process and determine  
9 which one to buy, that was not part of your survey methodology  
10 in this case?

11 A. That's correct. We're asking the relative importance of  
12 the attributes of The Backyard Grill branded Wal-Mart grills.  
13 We're not asking about all the other brands.

14 Q. I apologize if the Court already asked this question, but  
15 it may be similar.

16           You did not survey Wal-Mart's Backyard brand sales  
17 and profits versus the sales and profits of similar products  
18 sold under national brands at Wal-Mart, perhaps?

19 A. Yes, it wasn't part of my assignment to look at the sales  
20 of the different brands through the Wal-Mart channel, that's  
21 correct.

22 Q. And your survey did not measure if Wal-Mart would have  
23 been equally profitable if it selected a brand name other than  
24 Backyard, right?

25 A. Yes. It wasn't part of my assignment to look at

1     profitability in any way.

2     Q.   Okay.  Are you aware of a brand name Sam's Choice?

3     A.   Sam's Choice?

4     Q.   Correct.

5     A.   I don't know that I know that brand.

6     Q.   Okay.  Now, as to the survey that you did conduct for this  
7     case, isn't it true that this is the first time in litigation  
8     where you've reached a conclusion about the relative  
9     importance of a brand in consumer purchasing decisions?

10    A.   I've had other studies that used brand, but this is one  
11    where the key issue is about the brand.  So I've studied  
12    brands in other litigation contexts, but this is one where I'm  
13    being asked to opine specifically on the relative importance  
14    of the brand.

15    Q.   So is the answer to my question yes?  Is this the first  
16    time in litigation where you have reached a conclusion about  
17    the relative importance of brand in consumer purchasing  
18    decisions?

19    A.   The only reason I hesitate is because sometimes in  
20    likelihood of confusion surveys, we're also opining with  
21    regard to brand, and those might fall under the way you asked  
22    the question.

23                 But this is the only study where I've specifically  
24    been asked to measure the relative impact of a brand on  
25    consumers' decision to purchase and opine exclusively on that

1 brand. We've used that constant sum allocation in other court  
2 cases, but this is one that focuses on brand.

3 Q. Okay. Just to make sure we're clear for the record, I'm  
4 just trying to get a yes.

5 In litigation, this is the only survey where you've  
6 reached a conclusion that you can recall regarding the  
7 relative importance of the brand in consumer purchasing  
8 decisions, yes or no?

9 A. I'm just going to say I don't know for sure, the way  
10 you're asking it. I could have offered opinions with regard  
11 to the relative importance of brand in other matters where  
12 brand was also an issue. The only thing I'm agreeing to is  
13 that this is the only one I can think of where brand was the  
14 only issue.

15 Q. Dr. Van Liere, do you recall having your deposition taken  
16 on September 14, 2016, in New York?

17 A. With you?

18 Q. Yes.

19 A. Yes.

20 Q. Okay.

21 A. I recall that.

22 MR. SHAW: Your Honor, I'd like permission to read  
23 from the deposition transcript. Would you like a copy?

24 THE COURT: I don't have a copy, and I don't know why  
25 you're doing that. What are you trying to do, impeach him?

1 MR. SHAW: I'm trying to refresh his recollection.

2 THE COURT: I'm sorry?

3 MR. SHAW: I'm trying to refresh his recollection  
4 because he says he doesn't recall now.

5 THE COURT: I haven't decided that I would accept his  
6 opinion as an expert. I mean --

7 MR. SHAW: Okay.

8 THE COURT: -- did you not hear that?

9 MR. SHAW: I did.

10 THE COURT: Okay. Did that click in your mind or  
11 anything?

12 MR. SHAW: Fair enough.

13 THE COURT: No. I mean, what are you doing? You're  
14 trying to impeach him, right?

15 MR. SHAW: I was trying to refresh --

16 THE COURT: Go ahead. If you want to go through the  
17 moot court practice, go ahead.

18 BY MR. SHAW:

19 Q. It's brief, but I'll read page 204, lines 5 through 13.

20 "Question: As you sit here today, this is the only  
21 survey where you have reached a conclusion that you can recall  
22 regarding the relative importance of the brand in consumer  
23 purchasing decisions?

24 "Answer: In litigation, is that your question?

25 "Question: Yes.

1 "Answer: Yes, that's correct."

2 Do you recall that testimony?

3 A. As I sat there that day, as best as I could recall, that's  
4 true.

5 Q. Dr. Van Liere, you're not offering any opinion on the  
6 value of The Backyard brand, are you?

7 A. No, I don't understand my assignment to be offering an  
8 opinion about the value of the brand as a numerical number.

9 Q. You don't have any specific assessment of the value of the  
10 brand -- The Backyard brand to Wal-Mart, correct?

11 A. By "value," I'm going to understand you to mean am I being  
12 asked to put a dollar figure on the value of the brand and,  
13 no, I'm not.

14 Q. And you're not measuring the value of The Backyard Grill  
15 brand as it relates to any specific benefit received by  
16 Wal-Mart, right?

17 A. Again, with the understanding of value as dollars, no, I'm  
18 not.

19 Q. And you agree that the value or the importance of the  
20 brand is not simply dependent at the moment a consumer decides  
21 to buy a product, correct?

22 A. I'm not here to offer an opinion about the value of the  
23 brand. So what considerations that might involve, I don't  
24 have an opinion about that.

25 Q. You understand that this Court already found willful



1 infringement, correct?

2 A. Generally.

3 Q. You read the summary judgment order, correct?

4 A. Yes.

5 Q. And you provided a supplemental report after that summary  
6 judgment order?

7 A. I don't recall the exact timing. I'll take your word for  
8 it that it came after that.

9 Q. I believe you testified in your deposition that you didn't  
10 try to spend any time in trying to find out the reasons why  
11 Wal-Mart selected its Backyard brand name; did you?

12 A. No, that's correct. I was simply asked to measure its  
13 relative importance.

14 Q. You didn't conduct any apportionment survey in this case,  
15 did you?

16 A. I don't know how the survey was used relative to any  
17 apportionment exercise because I'm not being asked to offer a  
18 dollar -- an opinion with regard to dollars. So --

19 Q. You were not asked to offer an opinion as to apportioned  
20 profits based on the attributes that were included in your  
21 survey, correct?

22 A. Yes, that's correct. I was not asked to offer an opinion  
23 based on the survey about how that would relate to an  
24 apportionment analysis.

25 Q. So your survey was not an apportionment survey?

1 A. I don't want to say that because sometimes surveys like  
2 this may be part of an apportionment analysis, so I don't  
3 agree with that.

4 Q. You're not offering an opinion on the apportionment of  
5 profits?

6 A. I'm not offering an opinion on the apportionment, that's  
7 correct.

8 MR. SHAW: Your Honor, at this time, I'd ask the  
9 Court to exclude Dr. Van Liere's testimony as being  
10 irrelevant. It's the first time he claims to have offered any  
11 type of an opinion like this in litigation. It's not an  
12 apportionment which, under the law, a survey can be relevant  
13 for.

14 THE COURT: What are you doing? You're moving to  
15 strike his entire testimony?

16 MR. SHAW: Yes.

17 THE COURT: Denied.

18 Do you have any redetect?

19 MR. HOSP: No redirect. But I failed to move into  
20 evidence D270 and D271, which are the tables that  
21 Dr. Van Liere discussed. I would move those in at this time.

22 THE COURT: They will be received.

23 (Defendant's Exhibits 270 and 271 received.)

24 THE COURT: Thank you, sir.

25 THE WITNESS: Thank you.

1 (Witness excused.)

2 MR. HOSP: The defendants call Mr. Rogers.

3 (Witness sworn.)

4 MR. HOSP: Your Honor, as with the previous witness,  
5 we have a binder for the Court and the witness that we intend  
6 to use.

7 THE COURT: Thank you.

8 GRAHAM ROGERS, DEFENDANT'S WITNESS, SWORN

9 DIRECT EXAMINATION

10 BY MR. PUZELLA:

11 Q. Good morning, Mr. Rogers.

12 A. Good morning.

13 Q. Could you introduce yourself to the Court, please.

14 A. Yes. My name is Graham Dillingham Rogers.

15 Q. Were you retained as an expert in this litigation?

16 A. I was.

17 Q. Were you asked to provide an opinion on a particular  
18 subject in this case?

19 A. Yes, I was.

20 Q. What were you retained to do?

21 A. I was asked to review the expert reports submitted by  
22 Dr. Poindexter in this case for the plaintiff, and I was also  
23 asked to consider if there should be any monetary recovery  
24 regarding the trademark at issue in this case.

25 Q. Do you have a particular area of expertise?

1 A. Yes, I do.

2 Q. And what is that?

3 A. My experience is in reviewing the financial and factual  
4 information in complex commercial litigation cases and  
5 determining damages, with an area of specialty in intellectual  
6 property damages.

7 Q. What is your educational background?

8 THE COURT: What's your academic background?

9 THE WITNESS: My academic background, in 1987, I  
10 graduated from the United States Naval Academy. And then in  
11 1996, I graduated from the University of Chicago Graduate  
12 School of Business, with an emphasis on finance and economics.

13 THE COURT: What degree is that?

14 THE WITNESS: An M.B.A. in finance and economics.

15 BY MR. PUZELLA:

16 Q. Are you currently employed?

17 A. Yes, I am. I have my own firm. It's called Roger Damages  
18 and Valuations Services, LLC.

19 Q. Before you started your own firm, give us a bit about  
20 where you worked previously.

21 A. Coming out of the Naval Academy, I had a commitment to pay  
22 back so I paid back seven years in the Service. Then after  
23 graduate school, I worked in various Big Four accounting firms  
24 and boutique consulting firms working on litigation consulting  
25 services.

1 THE COURT: What Big Four firms did you work for?

2 THE WITNESS: I worked for PricewaterhouseCoopers,  
3 PwC, and Deloitte.

4 THE COURT: Okay.

5 BY MR. PUZELLA:

6 Q. Do you have any professional certifications?

7 A. I'm sorry. Can you hear my okay? My throat's sore.

8 I am an accredited senior appraiser with the American  
9 Society of Appraisers. I'm a certified valuation specialist  
10 from the Royal Institute of Chartered Surveyors. And I'm a  
11 CLP, a certified licensing professional, from the Licensing  
12 Executive Society.

13 Q. Have you acted as a damages expert in an intellectual  
14 property case before?

15 A. Yes.

16 Q. About how many times?

17 A. Probably about 60 times.

18 Q. Have you acted as a damages expert in a trademark case  
19 before?

20 A. Yes, I have.

21 Q. About how many times?

22 A. About eight to ten times.

23 THE COURT: When you say "intellectual property  
24 cases," you're talking about copyright cases or patent cases?

25 THE WITNESS: It could be copyright, patent, it could

1 be trade secret, yes.

2 THE COURT: Trade secret meaning a nonfederal  
3 protected right?

4 THE WITNESS: Right.

5 THE COURT: And this was civil litigation?

6 THE WITNESS: Yes, but the trade secret -- I'm sure  
7 you're aware a trade secret could be both criminal and civil.  
8 Everything else would be a civil matter.

9 THE COURT: Were these cases in which you simply  
10 rendered an opinion or you actually testified as a live  
11 witness in a trial?

12 THE WITNESS: I testified in a live trial about five  
13 times.

14 THE COURT: Okay.

15 THE WITNESS: And rendered an opinion probably  
16 60 times, and then submitted a report of some kind in some  
17 number in between.

18 THE COURT: So you've had five experiences, as you're  
19 having today, being on the stage as a live witness. How many  
20 of those were in a United States District Court?

21 THE WITNESS: I think all of them, but I'd have to  
22 look at the CV to make sure. One of them was in the Court of  
23 Federal Claims, which I'm not sure how you want to classify  
24 that. But the rest of them I think would be all federal.

25 THE COURT: Okay.

1 BY MR. PUZELLA:

2 Q. Have you provided expert opinions on disgorgement of a  
3 defendant's profits before?

4 A. Yes, I have.

5 Q. How many times?

6 A. It would have been in each one of the trademark matters  
7 I've been involved in.

8 Q. Do you have a curriculum vitae that summarizes your  
9 professional experience?

10 A. I do.

11 Q. Could you turn in your Exhibit binder there to Exhibit  
12 D148?

13 A. I'm sorry. You said 148?

14 Q. 148.

15 A. Okay.

16 Q. What is it?

17 A. This appears to be my CV that would have been current as  
18 of May of 2016.

19 MR. PUZELLA: Your Honor, we offer Exhibit D148.

20 THE COURT: It will be received.

21 (Defendant's Exhibit 148 received.)

22 BY MR. PUZELLA:

23 Q. To the best of your knowledge, have any of your expert  
24 opinions on IP damages ever been excluded by a court?

25 A. No.

1 Q. Have they been limited?

2 A. Not to my knowledge.

3 MR. PUZELLA: Your Honor, I offer Mr. Rogers as a  
4 damages expert in this case.

5 THE COURT: Along the lines of -- in his initial  
6 couple of words, I heard what I thought was the legal point of  
7 damages, and I don't think he's entitled to express a legal  
8 opinion about what damages are appropriate. That is reserved  
9 for the Court as a matter of law. But I'll allow you to have  
10 his factual opinions expressed.

11 MR. PUZELLA: Thank you, your Honor.

12 BY MR. PUZELLA:

13 Q. Mr. Rogers, have you arrived at an expert opinion in this  
14 case?

15 A. Yes, I have.

16 Q. What materials did you review in arriving at that opinion?

17 A. I reviewed the financial and factual documents provided by  
18 both sides in this matter. I also reviewed the consumer  
19 survey that was provided by Dr. Kent Van Liere. That would  
20 have been it.

21 Q. From an economic point of view, what is your expert  
22 opinion in this case?

23 A. From an economic point of view, my expert opinion is that  
24 the value that's attributable to the trademark in the matter  
25 in this case should be zero dollars.



1 THE COURT: It should be zero?

2 THE WITNESS: Yes, sir.

3 BY MR. PUZELLA:

4 Q. How did you arrive at your opinion?

5 A. I arrived at my opinion by looking at this in three steps.  
6 The first step is to identify all of the revenues associated  
7 with the products in question. The second step is to reduce  
8 the revenues by the variable costs associated with the  
9 production of the products to get to an incremental profit  
10 number.

11 THE COURT: I hate to interrupt. But I'm just  
12 getting to the point so we'll talk.

13 Wouldn't it be fair to say that your opinion is that  
14 Variety didn't lose the sale of a single item and Wal-Mart  
15 didn't gain the sale of a single item because of the cross-use  
16 of this trademark, Backyard?

17 THE WITNESS: I wasn't asked specifically to look at  
18 that question.

19 THE COURT: So that there's no economic consequence  
20 either way, is that your opinion?

21 THE WITNESS: My expert opinion is the value  
22 attributable to the trademark in question with regards to the  
23 remaining profits is zero to the trademark, which would mean  
24 that there are other factors that must be derived in the  
25 profits that Wal-Mart gained.

1 THE COURT: But you haven't been asked to monetize  
2 the punishment factor for willful infringement of the  
3 trademark? You're not prepared to say whether the value and  
4 the integrity of that mark has a value, are you?

5 THE WITNESS: That's correct. Like you said, I'm not  
6 here to provide a legal opinion. My job is to look at the  
7 value of the trademark in question.

8 THE COURT: Okay. Okay. I get it.

9 BY MR. PUZELLA:

10 Q. Mr. Rogers, I believe you were articulating three steps  
11 you took in forming your opinion. I believe you were at the  
12 second.

13 A. The second step was to identify the variable costs that  
14 should be deducted from the revenues that I identified in the  
15 first step to end up with an incremental profit number.

16 The final step, once you end up with the incremental  
17 profit number, is determining what the value associated or  
18 attributable to the trademark is in the question. And so  
19 that's the third and final step.

20 Q. Is the framework for your analysis in this case similar to  
21 those you've used in other cases where you've been retained as  
22 a damages expert?

23 A. Yes, in each and every one.

24 Q. Is the framework for your analysis in this case similar to  
25 those you used in the valuation analyses you've conducted

1 outside the litigation context?

2 A. Yes.

3 Q. Were you in court earlier where there was a discussion of  
4 the fact that the parties had stipulated to certain figures  
5 concerning Wal-Mart's sales of goods bearing The Backyard  
6 Grill mark?

7 A. Yes, I was.

8 Q. You should have there with you the parties' proposed joint  
9 pretrial order.

10 A. Yes.

11 Q. If you could turn to page 9.

12 THE COURT: You would basically agree with me that  
13 the word "Backyard" has, in your opinion, no consequence. It  
14 could have been neighborhood. It could have been summer. It  
15 could have been any sort of image-creating preference, and  
16 Wal-Mart would have sold the same number of grills at the same  
17 price to the same people?

18 THE WITNESS: Yes, sir, based on the survey results,  
19 which I understand showed that --

20 THE COURT: They don't care.

21 THE WITNESS: -- the name shows no importance.

22 THE COURT: The consumer in a Wal-Mart could care  
23 less what it's called. They might care if it's called  
24 Wal-Mart or Sam, but you could make it neighborhood, summer,  
25 autumn, whatever you feel like, and it's going to have the

1 same effect.

2 THE WITNESS: That's my understanding of the results  
3 of the survey.

4 THE COURT: Well, in your opinion.

5 THE WITNESS: Well, I'm not a survey expert.

6 THE COURT: But you're a damages expert.

7 THE WITNESS: Yes, sir.

8 THE COURT: The damages would be nonexistent no  
9 matter what they named it?

10 THE WITNESS: That's correct. In this case -- and,  
11 again, I'm looking at what the value is attributable to the  
12 trademark. So the other side of that says there are other  
13 things that are driving the value.

14 THE COURT: Do you think you could trademark  
15 "neighborhood"?

16 THE WITNESS: I'm not sure. I'm not a trademark  
17 expert.

18 THE COURT: I don't think you could trademark  
19 "summer" any more than you could "big."

20 Okay.

21 BY MR. PUZELLA:

22 Q. Could I turn your attention to the parties' proposed  
23 pretrial order and the stipulations found on page 9 at  
24 paragraph 11.

25 A. Okay.

1 Q. What does paragraph 11 concern?

2 A. 11 appears to be the sales associated with the store  
3 sales. There's two different time periods listed here. The  
4 first one is January 1, 2011 through December 4, 2015. And  
5 the second one is October 8, 2011 through December 4, 2015.

6 Q. Why are there two time periods identified in paragraph 11  
7 as it relates to Wal-Mart's revenue?

8 A. My understanding is there was a discrepancy as far as when  
9 the parties believe as to when damages start to accrue. My  
10 opinion is this should be from October 8, which is the date  
11 that I understand that the first products were being sold in  
12 the market.

13 Q. So for purposes of your calculations, when do you begin  
14 counting revenue?

15 A. I start on October 8, 2011.

16 Q. Which of the numbers in paragraph 11 is that?

17 A. The second number. Are we okay to read numbers?

18 Q. Yes.

19 A. The second number, which is the \$885.9 million.

20 MR. PUZELLA: Your Honor, I understood plaintiff  
21 earlier to move in the exhibits that are referenced in  
22 stipulation. For the avoidance of doubt, those are  
23 Exhibits D105, D208, and D118, which are the underlying  
24 financial documents that we'll move in now.

25 THE COURT: All right. They're received.

1 (Defendant's Exhibits 105, 208, 118 were received.)

2 BY MR. PUZELLA:

3 Q. What do you understand the correct point to stop  
4 calculating revenue for goods sold bearing the mark?

5 A. December 7, 2015.

6 Q. Why that date?

7 A. My understanding is that's the date before summary  
8 judgment, and I understand that the parties have an agreement  
9 for sales after that time period. So the damages would stop  
10 as of December 7, 2015.

11 Q. Does the stipulated revenue in paragraph 11 take us to the  
12 correct ending point?

13 A. No. It only takes us through the week ending December 4,  
14 2015.

15 Q. How do you get to the correct ending point, the additional  
16 two days?

17 A. There's another document, and I believe it's covered in  
18 paragraph 14 of this page 9 that we're looking at. It covers  
19 three days, December 5, 6 and 7, 2015.

20 Q. Is there anything else to add to arrive at an overall  
21 revenue figure?

22 A. Well, this is for the store sales, so we need to include  
23 online sales in that.

24 Q. And are online sales referenced in paragraph 17 of the  
25 stipulation?

1 A. Yes, they are.

2 Q. So given the figures in paragraph 11, 14 and 17, how do  
3 you arrive at an overall revenue number?

4 A. You would need to add them all up.

5 Q. And, again, as to paragraph 11, you would begin with the  
6 lesser of two numbers referenced there?

7 A. Right, for the starting date of October 8, 2011.

8 Q. With respect to the online sales that are referenced in  
9 paragraph 17, did you consider anything besides the  
10 stipulation with respect to sales over the Internet?

11 A. Yes. When I reviewed the documents, it shows that -- that  
12 reports international sales in that document as well. So I  
13 excluded the international sales from the number that's  
14 reported in paragraph 17.

15 Q. Did you rely on the stipulations to perform your  
16 calculations in this case?

17 A. No. I relied on the underlying documents that I think  
18 these documents were pulled from.

19 Q. Can you generally describe the underlying financial  
20 documents?

21 A. Yes. They are -- they came to me as an Excel spreadsheet.  
22 So they are very voluminous spreadsheets, some of them 250,000  
23 rows worth of information. Other ones can be multi-million  
24 rows worth of information.

25 Q. Did you prepare an exhibit that summarizes your

1 calculations from those documents?

2 A. I did.

3 Q. Could you turn in your binder to Exhibit D152.

4 A. Okay.

5 Q. What is D152?

6 A. 152 are the summaries of my calculations that identifies  
7 the revenues and costs and the incremental profits associated  
8 with the products in question.

9 Q. Can you orient us to the document and describe how you  
10 arranged your tables?

11 A. Sure. The first set of tables in the first column are the  
12 revenues. In other words, the table that's marked as Table 1,  
13 Table 2 and Table 3 addressed the revenues. Table 1 are for  
14 the store revenues. Table 2 would be for the online revenues.  
15 And Table 3 would be the sum of the two tables.

16 Q. What do you believe the correct total revenue number is  
17 for the Court to consider?

18 A. In Table 3, the bottom of Table 3, the number of \$910.6  
19 million.

20 Q. Once you identified what you believed is the correct  
21 revenue number, what did you do next?

22 A. I then needed to start looking at the first variable cost.  
23 So the first variable I looked at was the cost of goods sold.  
24 I had to identify the cost of goods sold. So that was the  
25 next step.



1 Q. If you turn back to the parties' proposed joint pretrial  
2 order and the stipulations on page 10, paragraph 19, what does  
3 paragraph 19 concern?

4 A. Okay.

5 Q. What does paragraph 19 concern?

6 A. 19 are the costs associated with the store sales. Again,  
7 it breaks it down into two different time periods,  
8 January 1, 2011 to December 4, 2015, and October 8, 2011  
9 through December 4, 2015.

10 Q. In light of revenue for cost of goods sold, did you rely  
11 on the latter of those time periods?

12 A. That's correct.

13 Q. For the same reasons?

14 A. That's correct.

15 Q. What other aspects of the cost of goods sold do you  
16 include in your calculations that are referenced in  
17 paragraphs 20 and 21 on the stipulation?

18 A. Well, 19 takes us again through December 4, 2015. So I  
19 need to add the three additional days that we discussed  
20 earlier. I think paragraph 20 addresses the three additional  
21 days. Then on paragraph 21 would be the cost of goods sold  
22 for the online sales that were referenced in a previous  
23 paragraph.

24 Q. Are your calculations for in-store and online cost of  
25 goods sold also shown on your summary, Exhibit 152?

1 A. Yes, they are.

2 Q. Could you just orient us in your summary, Exhibit 152,  
3 please, as it relates to cost of goods sold.

4 A. Sure. In the second column, there are tables marked  
5 Table 19, Table 20 and Table 21. Table 19 would be the cost  
6 of goods sold for the store sales. Table 21 would be the cost  
7 of goods sold for the online sales. And Table 21 would be the  
8 cost of goods sold total between the two.

9 Q. What do you believe the correct cost of goods sold number?

10 A. The number at the bottom of Table 21 which is  
11 \$661.8 million.

12 Q. Now, once you determined the cost of goods sold, what did  
13 you do next?

14 A. The next step is to figure out what the gross margin is.  
15 And the gross margin is calculated by taking the revenue less  
16 the cost of goods sold, and that's shown in the table on this  
17 page as well.

18 In the third column, Tables 37, 38 and 39 are  
19 represented by the gross margins. Table 37 is for the store  
20 sales. Table 28 is for the online. And Table 29 is the  
21 total.

22 Q. What do you believe is the correct gross profit figure for  
23 the products at issue in this case?

24 A. The number at the bottom of Table 31, which is  
25 \$248.8 million.

1 Q. I believe you may have misspoken. Is it Table 39?

2 A. I'm sorry. I'm sorry. Table 39.

3 Q. Again, you believe that is the correct gross profit for  
4 the goods at issue?

5 A. Yes.

6 Q. Are there any other costs besides cost of goods sold that  
7 you believe should be deducted from Wal-Mart's revenue to  
8 arrive at a number that represents Wal-Mart's incremental  
9 profit on these products?

10 A. Yes. I need to identify any of the variables costs that  
11 might vary with the sale of a product. So in this case I've  
12 identified three that vary. The first one is a shipping cost.  
13 The second one is the variable components of SG&A, and the  
14 final one are the taxes.

15 Q. Do you have an understanding of whether Variety's expert  
16 agrees or disagrees as to whether it's appropriate to deduct  
17 variable costs?

18 A. My understanding is that he would agree that it's  
19 appropriate. I think that's what he would say, yes.

20 Q. Now, when you describe the further costs that you describe  
21 as variable, what makes them variable?

22 A. Well, they literally vary with the increase of sales. So  
23 if Wal-Mart sells an additional product, then they would incur  
24 variable costs associated with producing and delivering and  
25 selling that product.

1 Q. Why is it your opinion that it's appropriate to deduct  
2 variable costs in this case?

3 A. Again, my understanding is that incremental profit is the  
4 appropriate number to be considered for potential  
5 disgorgement, and so that's why I use incremental profit.

6 Q. At various points in addition to incremental profit, I may  
7 use contribution profit. Are those words interchangeable in  
8 your understanding?

9 A. From my understanding, they're interchangeable, yes.

10 Q. Why is it your opinion that it's appropriate to deduct  
11 Wal-Mart's shipping costs?

12 A. Well, the shipping costs here identify the costs  
13 associated with delivering the product from a Wal-Mart  
14 distribution center to a store or, in the case of the online,  
15 from a distribution center to the end customer. So they would  
16 vary with the sale of the product.

17 Q. How did you calculate shipping costs to deduct?

18 A. I was provided with what are called freight factors.  
19 Freight factors are used to calculate shipping. Companies of  
20 any type of size use freight factors to identify their  
21 shipping costs.

22 Q. If you would turn in your exhibit binder to Exhibit 163  
23 and 164.

24 A. Okay.

25 Q. What are those documents?

1 A. 163 are the freight factors that I received for the store  
2 sales, and 164 are the freight factors that I received for the  
3 online sales.

4 Q. Are those the documents you relied upon in connection with  
5 your calculations related to shipping costs?

6 A. Yes, they are.

7 MR. PUZELLA: Your Honor, I offer 163 and 164.

8 THE COURT: It will be received.

9 (Defendant's Exhibits 163 and 165 were received.)

10 BY MR. PUZELLA:

11 Q. Have you used freight factors in other cases to determine  
12 deductible shipping costs to arrive at an incremental profit?

13 A. Yes. Like I said, freight factors are -- of companies of  
14 any kind of size freight, factors would be a normal thing they  
15 use in the normal course of their business.

16 Q. How did you use the shipping cost information in your  
17 calculations?

18 A. Shipping costs are listed as a percentage and they're  
19 listed as a percentage of sales. So you could take -- freight  
20 factors are listed on an annual basis.

21 So you can take the percentages that are identified  
22 in the documents and apply them to the sales revenue that are  
23 identified in the tables that I've previously talked about in  
24 Table 1 and Table 2.

25 Q. If you could turn to your Exhibit D152, the summary of

1 your calculations. Is the shipping calculation referenced  
2 there?

3 A. It is. It's on the page that has the page number at the  
4 bottom, page 83. And there's a number of tables there, but  
5 Tables 55, 56 and 57. In the second column, there's a column  
6 entitled "Shipping," so Table 55 would be a store shipping  
7 costs, Table 56 would be the online shipping costs, and  
8 Table 57 would be the total of the two.

9 Q. And from Table 57, which is the total of the two, what do  
10 you believe is the correct shipping cost to deduct to arrive  
11 at an incremental profit figure?

12 A. Well, the number at the bottom of that Table 57 in column  
13 2 is \$12.2 million.

14 Q. You testified a moment ago that your opinion, when  
15 arriving at an incremental profit number, it's also  
16 appropriate to deduct certain SG&A costs. Do you recall that?

17 A. Yes.

18 Q. What are SG&A costs?

19 A. SG&A costs are sales, general and administrative costs.

20 Q. Why, in your opinion, is it appropriate to deduct SG&A  
21 costs?

22 A. There's a component of those costs that are variable. The  
23 point of the exercise is to identify all the costs that vary  
24 with the sale of the product. Since there's aspects of SG&A  
25 that vary, they need to be identified.

1 Q. Generally speaking, what are the types of costs that make  
2 up the category of SG&A?

3 A. There are various types of salaries. So in this case,  
4 distribution center salaries, store salaries, other types of  
5 salaries, payroll taxes based on those salaries; advertising  
6 costs; rent; utilities. There could be a variety of different  
7 types of costs.

8 Q. Are all SG&A costs variable?

9 A. No. They're a mixture of fixed and variable.

10 Q. In this case, is it correct you're only attempting to  
11 deduct the variable aspects of SG&A costs and not the fixed  
12 aspects?

13 A. That's correct. The intent is to identify the variable  
14 component.

15 Q. Is it possible to calculate the variable component?

16 A. Yes.

17 Q. How do you do that?

18 A. Well, there are two ways that I've seen done in the past.  
19 The first is on an account-by-account basis. So you look at  
20 each individual account and any types of documents that would  
21 fall within those accounts, and you would look at the  
22 document -- individual documents and make a determination of  
23 how much of it is variable and how much of it is fixed.

24 A company of any size, that's a very difficult  
25 process. Another way of calculating costs are what are

1 referred to as a regression analysis.

2 Q. What's a regression analysis?

3 A. A regression analysis is a statistical tool that's used to  
4 calculate -- or taking two variables and trying to determine  
5 an unknown value based on a dependent and independent  
6 variable. The purpose generally of regression is to find out  
7 if there's a relationship or establish a relationship between  
8 two variables.

9 In the case of sales and costs, we know that there's  
10 a relationship. When sales increase, costs increase. So the  
11 question was not I need to prove the fact that there's a  
12 relationship. The fact is, with the regression in this case,  
13 I just need to identify at what magnitude those costs vary.

14 Q. How does one perform a regression?

15 A. Regressions are included -- regression packages are  
16 included in all the basic software packages for spreadsheet  
17 analysis these days. I use Excel, so I use Excel to do my  
18 regression analysis.

19 Q. What data do you need to run a regression of the type you  
20 just described?

21 A. You need two variables. In this case for the linear  
22 regression, you need two variables over an extended period of  
23 time, so I used sales and costs in this case.

24 Q. What do you use for your data?

25 A. You need to use the lowest level of financial documents



1 that include the products in question. In this case, I used  
2 Wal-Mart's financial segment data for the outdoor and garden  
3 area, which is where the products in question, that's where  
4 they reside.

5 Q. If you can turn in your exhibit binder to D224 and D225,  
6 please.

7 A. Okay.

8 Q. Are those the segment data documents that you just  
9 referenced?

10 A. I guess they are.

11 Q. And those are the documents you relied on for purposes of  
12 your SG&A calculations?

13 A. Yes.

14 MR. PUZELLA: Your Honor, I offer D224 and D225.

15 THE COURT: Received.

16 (Defendant's Exhibit 224 and 225 were received.)

17 BY MR. PUZELLA:

18 Q. Why did you use Wal-Mart's annual financial segment data  
19 for your regression analysis?

20 A. As I said, you want to find the financial reporting  
21 documents that are the lowest level within a company that  
22 incorporate the products in question. So my understanding is  
23 that the segment data are the lowest level of financial  
24 documents that include the products in question.

25 Q. What was the result of your regression calculations?

1 A. The results show up as a linear equation, and one of the  
2 factors of the linear equation identifies the component of  
3 costs that are variable. In running my analysis, I showed  
4 18.22 percent as the variable component of the SG&A.

5 Q. Are there any metrics that give you any indication as to  
6 whether that calculation is correct?

7 A. Yes. You look at different statistics that are provided  
8 by the regression packages, and one of them is considered the  
9 R squared. The R squared ranges in a value from zero to one.  
10 The higher, closer to one, generally the better the fit, the  
11 model. In this case, I think the regression is -- the R  
12 squared number was about .954, I think.

13 Q. Are there any other statistical metrics that inform your  
14 assessment of your regression?

15 A. Yes. Another one to look at is called the P value. The  
16 lower the P value, the better. In this case, the number for  
17 the P value was .02, which again tells me that I have a good  
18 result.

19 Q. Did you include all of the data from the Wal-Mart annual  
20 financial segment data in your regression?

21 A. I did. When -- I did for both. For the initial report, I  
22 had information through fiscal year '15. I ran the regression  
23 for that. In the latest report, I had an additional year's  
24 worth of information.

25 When I reran the information, the results of the

1 regression did not turn out as you would expect. The fixed  
2 costs went negative and the variable component of SG&A went up  
3 and the R squared went down. So I had to go back and figure  
4 out what was causing the issue.

5           So I graphed the sales and the cost to figure out  
6 what the relationship -- if the relationship changed over a  
7 period of time. When you look at fiscal year '16, that was  
8 significantly different than the previous results. So from a  
9 statistic standpoint, that can be considered an outlier. So  
10 it was appropriate to remove an outlier and rerun your test,  
11 which left me with the information that I reran the first time  
12 in the regression, which is 18.22 percent.

13 Q. Have you used a regression analysis to determine variable  
14 components of SG&A in other cases where you have been retained  
15 as an expert?

16 A. Yes, I have.

17 Q. Do you believe your use of regression is appropriate in  
18 this case?

19 A. Yes, I do.

20 Q. So now that you have that 18.22 percent figure, how do you  
21 use that result in your calculations?

22 A. Well, the 18.22 percent is like it's entitled, it's a  
23 percentage. So you apply that times the sales associated with  
24 the products in question, and I think those were reported on  
25 that table that you were earlier referencing.

1 Q. Are your calculations of the variable SG&A costs reflected  
2 in your summary of calculations at Exhibit D152?

3 A. Yes, they are. They're in the table that we've been  
4 talking about before, Tables 55, 56 and 57. And the third  
5 column that's entitled SG&A, that's where those numbers are  
6 referenced.

7 Q. What is the total amount of SG&A cost that you believe  
8 should be deducted to arrive at incremental profit figure?

9 A. The total at the bottom of Table 57, which is  
10 \$109 million.

11 Q. Now, you testified a moment ago that your opinion at  
12 arriving at the incremental profit figure, it's also  
13 appropriate to deduct taxes as costs. Do you recall that?

14 A. Yes.

15 Q. Why, in your opinion, is it appropriate to deduct taxes?

16 A. Taxes for products that were sold and the profits that  
17 they made from those products, they had to pay taxes on those.  
18 So they are a variable with the -- they vary with the sale of  
19 the products. So the fact that they vary, again, I'm  
20 identifying variable costs, and that's a cost that was paid.

21 THE COURT: We're going to stop there and be in  
22 recess for midday until 2 o'clock. We'll resume at 2 o'clock.

23 (Recess)

24 THE COURT: You're still on your direct evidence with  
25 this witness.

1 MR. PUZELLA: Yes, your Honor.

2 THE COURT: Go ahead.

3 DIRECT EXAMINATION (Resumed)

4 BY MR. PUZELLA:

5 Q. Mr. Rogers, you still have the materials we were  
6 discussing in front of you?

7 A. Yes.

8 Q. I believe, when we broke, I was asking you about the tax  
9 deductions that you calculated. Do you recall that?

10 A. Yes, I do.

11 Q. What documents did you rely on to prepare your  
12 calculations that related to taxes?

13 A. Wal-Mart's annual financial statements.

14 Q. Can you turn in your exhibit binder, please, to  
15 Exhibits 226 through 231 and identify those for me, please.

16 A. They appear to be Wal-Mart financial documents for 2011  
17 through 2015.

18 Q. Are those the annual reports that you relied on in  
19 calculating your taxes?

20 A. Yes. Yes, they are.

21 MR. PUZELLA: Your Honor, I'd offer Exhibits 226  
22 through 231.

23 THE COURT: Received.

24

25

1 (Defendant's Exhibits 226-231 were received.)

2 BY MR. PUZELLA:

3 Q. How did you go about calculating the taxes you believe  
4 should be deducted as costs?

5 A. I'm sorry. Did you say how did I calculate?

6 Q. Yes. I'm sorry. How did you go about calculating?

7 A. So the annual reports report taxes as a dollar figure. So  
8 I have to determine what the effective tax rate was that they  
9 paid in a given year. So I take the tax dollars that they  
10 paid and divide that by the operating profit before tax to  
11 determine what the effective tax rate is.

12 Then that effective tax rate, Wal-Mart reports  
13 everything on a fiscal year, so I had to convert the fiscal  
14 year information to a calendar-year basis. And that gave me  
15 an effective tax percentage on a calendar-year basis that I  
16 could then apply in the numbers we have here.

17 Q. How did you use the tax cost information in your  
18 calculations?

19 A. So it came out as a percentage. So I was able to take the  
20 percentage and apply that by the operating profit before  
21 taxes.

22 Q. Are your tax calculations also summarized in your  
23 Exhibit D152?

24 A. Yes, they are.

25 Q. Could you show us in Exhibit D152 where your tax

1 calculations are shown?

2 A. Sure. The second -- the page that has the number of 83 at  
3 the bottom. Tables 55, 56 and 57. The fourth column is  
4 entitled "Taxes." So the Table 55 are the taxes for the  
5 store. Table 56 are the taxes for the online sales, and then  
6 Table 57 are the sum of the two.

7 Q. So what do you believe the appropriate amount for the  
8 variable tax cost is that should be detected?

9 A. That should be the number at the bottom of Table 57, and  
10 that's \$22.5 million.

11 Q. How do you use the calculations shown in Tables 55, 56 and  
12 57 that calculate the variable costs that you just testified  
13 about?

14 A. Well, those variable costs need to be subtracted from the  
15 gross margin that we talked about this morning. So I subtract  
16 those numbers from the gross margin, and that was reported  
17 earlier.

18 Q. And is that calculation that you just described further  
19 illustrated in your Exhibit D152?

20 A. It is. On the next page, page 84, there's a set of three  
21 tables. Table 73 are the store -- profits for the store.  
22 Table 74 are profits for the online sales. And Table 75 are  
23 the profits for the variable deductions for the total.

24 Q. What does Table 75 represent in your Exhibit D152?

25 A. They're the profits after the deductions and variable

1 costs that would be available for disgorgement.

2 Q. And the calculations shown in Table 75, those are profits  
3 throughout the United States?

4 A. That's correct.

5 Q. Okay.

6 MR. PUZELLA: Your Honor, I offer Exhibit D152.

7 THE COURT: It will be received.

8 (Defendant's Exhibit 152 received.)

9 BY MR. PUZELLA:

10 Q. Have you learned anything since you submitted your expert  
11 report that affects your calculations of these variable costs?

12 A. Yes. I learned that the shipping factor or freight factor  
13 for the online sales was given to me as a freight factor for  
14 the costs. There was a revenue component that was missing  
15 from the original disclosure to me.

16 So I asked for information regarding a net shipping  
17 cost, because the online has a revenue component in their  
18 shipping because they're shipping to the end customers in some  
19 cases, and the end customers are paying that shipping. So I  
20 needed to look at the net shipping as opposed to just the  
21 shipping cost.

22 Q. Does that additional information change the figure in  
23 Exhibit 75?

24 A. It does. What it does is it reduces the shipping cost  
25 which would have the effect of increasing the profit that's



1 listed in the tables. Effect is for Table 75, 75 is  
2 understated by, I think, it's \$930,000.

3 Q. So for your Table 75 to reflect that additional  
4 information, would you just add that amount to the amount  
5 shown in Table 75?

6 A. That's correct.

7 Q. In addition to deducting the variable costs you just  
8 described, did you conduct any other analyses to arrive at  
9 what you believe is an appropriate incremental profit figure  
10 in this case?

11 A. Yes. I looked at the sales on a geographic basis.

12 Q. Why did you look at sales on a geographic basis?

13 A. Well, I was trying to identify the sales that would have  
14 any relationship to the trademark in question.

15 So I understood that Variety had store locations and  
16 didn't have an Internet presence. So their footprint is  
17 restricted by the geographic areas where they have stores and  
18 can compete in. Any sales Wal-Mart made outside of that area  
19 would not have had any relationship to the trademark in  
20 question here.

21 Q. Have you conducted a geographic analysis like you just  
22 described in other cases?

23 A. I have.

24 Q. And how did you go about conducting that analysis here?

25 A. I'm sorry. What was the question?

1 Q. How did you go about conducting the geographic analysis in  
2 this case?

3 A. In this case. Okay, so I received information from  
4 Variety, and the Variety information came to me as a listing  
5 of stores with their city and state locations. And then I  
6 also received information from Variety that gave me store  
7 numbers and the address, city and state of all the Wal-Mart  
8 stores. And then I also received the financial documents that  
9 showed the sales and the cost information with the added  
10 column of store number.

11 So using those two pieces of information, I had the  
12 ability to map Variety's stores. And when I did that, I  
13 noticed that they had stores in 16 states. And then with  
14 D.C., or the District of Columbia, being in such close  
15 proximity to Virginia and Maryland, I included that as well.

16 So I noted that the Variety footprint was 16 states  
17 plus D.C.

18 Q. Can you turn in your binder to Exhibit D161.

19 A. Okay.

20 Q. Could you identify that document for us?

21 A. Yes. That's the Variety document I received that shows  
22 the stores by city and state.

23 Q. And is that the information you relied upon to conduct at  
24 least the Variety portion of your geographic analysis?

25 A. As far as the state portion, yes.

1 MR. PUZELLA: Your Honor, I offer D161.

2 THE COURT: Received.

3 (Defendant's Exhibit 161 received.)

4 BY MR. PUZELLA:

5 Q. How did you go about identifying the relevant Wal-Mart  
6 stores for your analysis?

7 A. Well, again, the document -- there was a document provided  
8 to me that listed the Wal-Mart stores by store number and then  
9 their address, city and state. And then the financial  
10 documents that were disclosed to me had sales and the cost  
11 information, with a column that had a store number.

12 So I could correlate the table of stores that I had  
13 to the financial documents and figure exactly what store sold  
14 what product.

15 Q. Could you turn in your binder, please, to Exhibits D106  
16 through 117 and identify those for us?

17 A. 106 is the file that I received that listed all the stores  
18 by store number with the address, city and state. And then  
19 the rest of the documents appear to be the Excel spreadsheets  
20 that I received for the sales and the cost information that  
21 included the column for store number.

22 Q. Before the Exhibits 107 through 117, are those the  
23 financial Excel files you referenced earlier that have many  
24 millions of rows of data?

25 A. Yes. I think it's like 5.2 million rows of data when you

1 combine them together.

2 MR. PUZELLA: Your Honor, I offer 106 through 117.

3 THE COURT: Received.

4 (Defendant's Exhibits 106-117 were received.)

5 MR. PUZELLA: And we can address this housekeeping  
6 issue later if you like, your Honor, but those exhibits are  
7 obviously something that cannot be printed. So we have  
8 electronic versions for the record.

9 THE COURT: Okay.

10 BY MR. PUZELLA:

11 Q. What did you do with your Exhibits D106 through 117? How  
12 did you perform this calculations?

13 A. Well, I created the database to combine all of the files  
14 together. That's how I found out there were about 5.2 million  
15 rows of information.

16 And using the Variety's locations, 16 states plus  
17 D.C., I was able to go in and identify a particular Wal-Mart's  
18 sales associated with sales in that particular state. So I  
19 basically calculated the sum of the sales for those 16 states  
20 and D.C.

21 Q. Did you consider any Internet or online sales in this  
22 analysis?

23 A. I did. The Internet file was just separate from the ones  
24 we were just talking about. The Internet file already had the  
25 information as far as the customer's shipping address and

1 state and zip code. So that was already in that file.

2 Q. And the Internet file you just referenced, that was a file  
3 that we reviewed earlier in connection with the stipulation?

4 A. That's correct.

5 Q. Did you prepare any summaries that illustrate your  
6 calculations related to this geographic analysis that you  
7 performed?

8 A. I did.

9 Q. Could you turn to Exhibit D151 in your binder, please.

10 A. Okay.

11 Q. What is D151?

12 A. 151 is summary tables that I calculated the sales revenue,  
13 the corresponding cost of goods sold, and then the gross  
14 margin and variable costs and then, therefore, the incremental  
15 profit.

16 Q. Could you, just with reference to the table numbers in  
17 Exhibit 151, describe which topic each of the tables refer?

18 A. Sure.

19 Table 4, sales revenue for store. Table 5 are the  
20 sales revenue for online, again, into the 16 states and D.C.  
21 Table 6 is the sum of the two. Table 22 is the cost of goods  
22 sold for the store sales. Table 23 is the cost of the online  
23 sales. And Table 24 is the total for the 16 states and D.C.  
24 Table 40 is the gross margin for store sales. And Table 41  
25 are the online gross margins. And Table 42 are the sum of the

1 two.

2 On the next page, Tables 58, 59 and 60 are the  
3 variable costs associated with the sales for the 16 states  
4 plus D.C. And then, finally, Tables 76, 77, and 78 are the  
5 profits after the deductions of the variable costs, with  
6 Table 78 being the total for profits for the 16 states plus  
7 D.C.

8 Q. What does Table 78 represent, in your opinion? And what  
9 is the amount?

10 A. Table 78 are the profits after the deductions of variable  
11 costs for sales into the 16 states plus D.C. That should be  
12 available for disgorgement.

13 Q. And what is the amount?

14 A. The total there is \$22.1 million.

15 MR. PUZELLA: Your Honor, I offer Exhibit 151.

16 THE COURT: Received.

17 (Defendant's Exhibit 151 received.)

18 BY MR. PUZELLA:

19 Q. Does the additional shipping information you testified a  
20 moment ago affect the number in Table 78 in Exhibit 151?

21 A. It did. It had a similar effect in all U.S. geographies  
22 when I applied the change to the sales in 16 states plus D.C.  
23 the effect is that the number here is underreported by  
24 \$390,000.

25 Q. So what should the amount in Table 78 be, approximately?

1 A. 22.5, roughly there.

2 Q. Did you conduct any other geographic analysis?

3 A. I did. I looked at a geographic analysis that included a  
4 review of the analysis at the store level.

5 Q. Why did you do that?

6 A. Well, again, I needed to -- I wanted to identify the sales  
7 that had any relationship to the trademark in question. And  
8 when I did it on the state level, there were some states that  
9 I thought that was not restrictive enough as far as the  
10 analysis.

11 For example, in Indiana, I think Indiana had four  
12 store locations. There were two in Indiana, one in Anderson,  
13 and one in Muncie. Indianapolis is right in the middle of the  
14 state. Muncie and Anderson are slightly northeast of  
15 Indianapolis.

16 And I didn't think that sales that might have been  
17 made by Wal-Mart in South Bend, Indiana, or in Evansville,  
18 Indiana, which are on extreme north and south of the state  
19 would have any knowledge of the trademark in question because  
20 they're two-plus hours away from the closest Variety store.

21 Similar to that, in Florida, the store locations for  
22 Variety, they were kind of around the Jacksonville area. So  
23 any Wal-Mart sales that might have taken place in Orlando or  
24 Miami or Key West, which were rightfully three-plus hours away  
25 from the closest Variety store, I didn't feel they would have

1 had any relationship to a sale including Variety's trademark.  
2 So I endeavored to try to find the number of stores where  
3 Wal-Mart sold that would have been within a footprint of  
4 Variety's that would make sense.

5 Q. Have you conducted a more detailed geographic analysis  
6 such as the one you just described in prior cases?

7 A. Yes, I have.

8 Q. Could you give us some examples?

9 A. Sure. On the patent side, in calculating lost profits, it  
10 would be normal for you to calculate where competitors overlap  
11 in sales. And one way to do that is to look at the sales  
12 forces of each company and find out where the sales forces are  
13 deployed, figure out what areas they cover with the sales  
14 force, and map that sales force against another company's  
15 sales force, and you can figure out where the overlapping  
16 territories are.

17 Q. How did you arrive at a distance to consider in this case?

18 A. Well, I figured that consumers were going to travel some  
19 distance, but I didn't know what distance they were willing to  
20 travel. I did some independent research on my own and  
21 identified a survey that talked about customers who bought  
22 products somewhat similar to this were willing to travel  
23 anywhere between 12 and 23 minutes to purchase products.

24 So for conservative purposes, I used 25 miles for a  
25 radius. I figured that was a conservative estimate based on



1 that survey I was looking at.

2 Q. What did you do with this information of 25 miles? What  
3 did that allow you to accomplish?

4 A. Well, the information that I had for the Variety stores, I  
5 was able to gain the particular addresses for those stores  
6 from comparing the stores in the list that we talked about to  
7 their actual corporate website that listed their store  
8 locations.

9 So taking the store locations, I mapped those store  
10 locations and then put a 25-mile radius around the store  
11 locations. Then I compared that with the Wal-Mart store  
12 locations and I identified any store -- any Wal-Mart stores  
13 that overlapped with that 25-mile radius. When I did that, I  
14 found that there were 1,166 Wal-Mart stores within a radius of  
15 25 miles of a Variety store.

16 Q. Have you learned anything since you submitted your expert  
17 report that informs your consideration of whether 25 miles is  
18 an appropriate distance for you to consider?

19 A. Well, yes. I looked at where Variety actually placed  
20 their stores. And even at a 5-mile radius, some Variety  
21 stores -- a number of Variety stores overlap with each other.  
22 So that tells me that Variety believes that their consumers  
23 are willing to travel anywhere from 25 1/2 to, at most,  
24 5 miles to get to a Variety store.

25 Q. Did you consider anything else?

1 A. I also had a conversation with Wal-Mart, some people in  
2 their data analytics group and asked them the question if they  
3 had any information that might help me in this area. And I  
4 was informed that customers who buy these products travel  
5 anywhere between 5 to 7 miles to buy these types of products  
6 in a Wal-Mart store.

7 Q. Did that additional information affect your analysis in  
8 any way?

9 A. It didn't change the analysis, but what it did was it made  
10 me feel very comfortable that the 25-mile radius that I was  
11 putting around the Variety store was a very conservative  
12 estimate.

13 Q. What was the result of this further geographic analysis  
14 you just described?

15 A. Well, I was able to identify the 1,166 stores. And then  
16 when I note -- now I know which store by store number, I go  
17 back in the database and identify the sales and costs  
18 associated with sales only from those 1,166 stores.

19 Q. Did you use the same Exhibits D107 through D117 to  
20 identify the sales by store as you did in your state analysis?

21 A. I did, yes.

22 Q. Did you consider online sales in this analysis?

23 A. I did, but I kept it at the state level. I thought doing  
24 it on an individual customer basis would have been very  
25 difficult to do. So I kept it at the state level, which was a

1 conservative way of looking at.

2 Q. Have you prepared any summaries that illustrate your  
3 calculations?

4 A. Yes, I did.

5 Q. Could you turn in your binder to Exhibit 150, please.

6 A. Okay.

7 Q. Could you identify Exhibit 150, please.

8 A. This is the summary of the sales and costs and the profits  
9 for Wal-Mart sales into the 1,166 stores or within a 25-mile  
10 radius of a Variety store.

11 Q. With reference to the table numbers, could you give us the  
12 overview of the different columns?

13 A. Sure. The revenues are covered in Tables 7, 8 and 9. The  
14 cost of goods sold are covered in Tables 25, 26 and 27. And  
15 the gross margins are covered in Tables 43, 44, and 45.

16 On the next page, there's a -- the tables are  
17 numbered Table 61, 62 and 63. Those are the variable costs  
18 associated with sales for the 1,166 stores. And then,  
19 finally, on Table 79, 80 and 81 are the profits for the sales  
20 for the 1,166 stores.

21 Q. Turning your attention to Table 81, what does Table 81  
22 represent, in your opinion?

23 A. Table 81 are the incremental profits after all the  
24 deductions for variable costs for Wal-Mart sales within a  
25 25-mile radius of a Variety store.

1 MR. PUZELLA: Your Honor, I offer Exhibit 150.

2 THE COURT: Received.

3 (Defendant's Exhibit 150 received.)

4 BY MR. PUZELLA:

5 Q. Does the additional information about net shipping cost  
6 effect that number in Table 81?

7 A. Yes, it does have the same effect. When you reduce it  
8 down to the 25 miles, since I used the same state that I did  
9 at the last -- the state level, it actually has the same  
10 effect. So the profits here are underreported by 390,000.

11 Q. Did you conduct any other analyses with regard to Wal-Mart  
12 sales?

13 A. I did. I looked at it on a product-by-product basis.

14 Q. Why did you do that?

15 A. Well, Variety has obviously a number of products that they  
16 have the brand on, the trademark on. Wal-Mart has products  
17 that they have the trademark on. So I wanted to look at those  
18 products that were similar in nature. So I decided to look at  
19 an analysis of the UPCs and the descriptions of the UPCs and  
20 put them into buckets.

21 And the buckets that I put them in were products that  
22 I felt were similar between the two companies, products that  
23 Variety had that Wal-Mart would not have offered and then  
24 other types of products that Wal-Mart had that Variety did not  
25 offer.

1 Q. Did you create a summary of your product-by-product  
2 analysis?

3 A. I did.

4 Q. Can you turn to Exhibit D153 in your binder, please.

5 A. Okay.

6 Q. Is that the summary you just described?

7 A. It is. It's the spreadsheet of the buckets that I created  
8 in putting the UPCs into each of the individual buckets.

9 MR. PUZELLA: We offer 153, your Honor.

10 THE COURT: It will be received.

11 (Defendant's Exhibit 153 received.)

12 BY MR. PUZELLA:

13 Q. What was the result of your product analysis?

14 A. I identified that there were 197 UPCs that were bucketed  
15 into the category where both products were similar in nature  
16 between the two parties. I took that 197, again went back to  
17 the database and identified the sales for the UPCs that had  
18 those 197 UPC numbers, and created an analysis for the sales  
19 and the profits associated with those 197 UPCs.

20 THE COURT: What's a UPC?

21 THE WITNESS: I think universal product code. It's  
22 the product number.

23 THE COURT: You mean like if Wal-Mart sells a mop and  
24 Variety sells a mop?

25 THE WITNESS: The numbers themselves didn't tell me

1 anything. The descriptions of the products told me if it was  
2 a mop and a mop.

3 THE COURT: But you're not analyzing products that  
4 either store trademarked under the name Backyard, are you?

5 THE WITNESS: Well, all these products would have had  
6 the trademark on them.

7 THE COURT: They would?

8 THE WITNESS: All the ones I looked at had the  
9 products.

10 THE COURT: All of the 190-some-odd products?

11 THE WITNESS: There's actually 375 total.

12 THE COURT: Products that had the trademark Backyard  
13 on it?

14 THE WITNESS: Yes.

15 THE COURT: Okay.

16 THE WITNESS: And 197 of those are categories that I  
17 put in that are similar in nature.

18 THE COURT: It extends far beyond grills.

19 THE WITNESS: I think there are a number of UPCs that  
20 cover just grills. It's grills and accessories and spatulas  
21 and other things like that.

22 THE COURT: Okay.

23 THE WITNESS: And Variety offered things like garden  
24 hoses --

25 THE COURT: That say Backyard?

1 THE WITNESS: Yes.

2 THE COURT: That are trademarked?

3 THE WITNESS: Yes.

4 THE COURT: Okay.

5 BY MR. PUZELLA:

6 Q. Did you prepare a summary of this product analysis you  
7 just described?

8 A. I did.

9 Q. Could you turn to Exhibit D149 in your binder, please.

10 A. I'm sorry. What was the number?

11 Q. 149.

12 A. Okay.

13 Q. What is 149?

14 A. 149 are the summary tables I put together. They're set up  
15 like the other ones we talked about. It identifies the sales,  
16 the cost of goods sold, the variable costs and profits for the  
17 products -- for the 197 products. The only difference is that  
18 I included in that the three levels of geography that we  
19 previously talked about.

20 So there's 197 UPCs at all geographies, 197 UPCs at  
21 16 states and D.C. level, and then 197 product at the 25-mile  
22 radius.

23 THE COURT: Just so I understand, this is apples to  
24 apples. That Variety has a product on the shelf that has  
25 Backyard as its trademark and Wal-Mart has a product, same

1 product, on its shelf that has Backyard as its trademark?

2 THE WITNESS: That was the intent, to identify  
3 similar products, yes.

4 THE COURT: Okay.

5 BY MR. PUZELLA:

6 Q. Looking at 149, could you very quickly just walk us  
7 through the different pages to orient us?

8 A. Sure. The page that has the page No. 63 at the bottom,  
9 all three columns of those are the revenues associated. The  
10 first set of columns, Tables 10, 11 and 12, are for the  
11 revenues for all U.S. states and geographies.

12 Tables 13, 14 and 15 are all the revenues associated  
13 with the 197 products and 16 states and D.C. And the final  
14 set of columns at Tables 16, 17 and 18 are the revenues  
15 associated with the 25-mile radius.

16 The next page is all the costs of goods sold. Again,  
17 they're broken down by the three different geographies.

18 Table 28, 29 and 30 are for all U.S. states. Table  
19 31, 32 and 33 are for 16 states plus D.C. Tables 34, 35, 36  
20 are for the sales within 25-mile radius.

21 Next page are the gross margins. 46, 47, 48, all  
22 U.S. states. 49, 50 and 51 are for the 16 states plus D.C.  
23 And 52, 53 and 54 are for the sales within a 25-mile radius.

24 The next page, page 66, is a page covering the  
25 variable costs for all U.S. states and territories. 64, 65



1 and 66, the next page, are the variable costs associated with  
2 16 states plus D.C.

3 Table 67, 68, 69, next page, are the variable costs  
4 associated with the sales into the 25-mile radius with a  
5 Variety store. Table 70, 71 and 72. And then the final page  
6 is page 69. It lists the profit tables, the incremental  
7 profit tables. That's Tables 82, 83 and 84, all states. And  
8 Tables 85, 86 and 87 are the 16 states and D.C. Tables 88, 89  
9 and 90 are profits associated with 197 products in a 25-mile  
10 radius with a Variety store.

11 Q. With respect to Tables 84, 87 and 90 in your Exhibit 149,  
12 what do those totals represent?

13 A. Those would be the incremental profits that I calculated  
14 for the 197 products into the various geography buckets. So  
15 those would be the incremental profits that would be available  
16 for disgorgement.

17 Q. What are those amounts for all U.S. states?

18 A. All U.S. states in Table 84, the amount is \$49.1 million.

19 Q. What is the amount for the 16 states plus D.C.?

20 A. 16 states plus D.C. is \$21.6 million.

21 Q. And the 25-mile radius?

22 A. Within a 25-mile radius, \$12.1 million.

23 MR. PUZELLA: Your Honor, I offer Exhibit 149.

24 THE COURT: Received.

25

1 (Defendant's Exhibit 149 received.)

2 BY MR. PUZELLA:

3 Q. Does the additional shipping information you testified  
4 about earlier affect the numbers in those three tables?

5 A. It does. Again, it has the same effect. Table 84 is  
6 understated here by \$100,000 -- roughly \$100,000. And  
7 Table 87 and 90 are understated by approximately \$50,000 each.  
8 So that's the effect.

9 Q. Based on your overall analysis, do you have an opinion on  
10 what is the appropriate calculation of Wal-Mart's incremental  
11 or contribution profit for goods bearing The Backyard Grill  
12 and design mark in this case?

13 A. Yes. My opinion is the incremental profits that's  
14 identified in Table 90 which is the \$12.1 million, but then  
15 you have to add the \$50,000 for the extra shipping costs that  
16 needs to be included in that.

17 Q. Do you have any opinion as to whether it's appropriate to  
18 disgorge any of Wal-Mart's profits?

19 A. Yes, I do.

20 Q. What is your opinion?

21 A. My opinion is that the amount of this profit that's  
22 attributable to the trademark is zero dollars.

23 Q. Do you have any particular professional experience that  
24 allows you to offer that opinion?

25 A. Well, I've been -- the damages work I've been doing over

1 the last number of years. Also, I do IP valuation work, where  
2 IP valuation work is very similar in trying to determine  
3 whatever you're valuing, what portion is attributable to the  
4 intellectual property that you are valuing.

5 THE COURT: Would it be fair to say that the  
6 trademark in this case -- which is a registered trademark.  
7 You understand that?

8 THE WITNESS: I understand.

9 THE COURT: (Continuing)) -- is a right without a  
10 remedy?

11 THE WITNESS: I'm not sure I understand what your  
12 term is.

13 THE COURT: Think about it. It's a defensible right.  
14 Isn't a trademark a defensible right?

15 THE WITNESS: Absolutely, sir.

16 THE COURT: In effect, it has no remedy because you  
17 just said it's worth zero.

18 THE WITNESS: In my opinion, it has no monetary  
19 remedy.

20 THE COURT: Uh-huh.

21 THE WITNESS: I've done valuations in a number of  
22 cases where somebody has a patent or a trademark --

23 THE COURT: And it's worthless.

24 THE WITNESS: It has zero or little value, that's  
25 correct.

1 THE COURT: So your testimony is that The Backyard  
2 trademark in this case was worthless.

3 THE WITNESS: The value attributable to the sale of  
4 these products. I didn't conduct a valuation of the trademark  
5 from Variety's standpoint. To do a valuation of the  
6 trademark, you would have to look at it from Variety's  
7 standpoint and what was their sales and what was the value of  
8 the trademark to their sales and then also if they could have  
9 gained any value from potentially licensing it out to other  
10 parties, they could gain a value from that.

11 But from the perspective of what was the value  
12 attributable to the profit that was attributable to the value  
13 of the trademark in this case --

14 THE COURT: It's worthless.

15 THE WITNESS: It's zero.

16 THE COURT: Okay. And that's your opinion?

17 THE WITNESS: Yes, your Honor.

18 THE COURT: Okay.

19 BY MR. PUZELLA:

20 Q. What is the basis for your opinion that no profits should  
21 be disgorged?

22 A. After reviewing Dr. Kent Van Liere's survey, it shows the  
23 trademark is not considered as a -- the trademark is not  
24 considered by the consumers when making their purchasing  
25 decision to buy these types of products.

1 Q. Have you ever relied on surveys such as the one you just  
2 testified about in your work?

3 A. Yes, I have.

4 THE COURT: Is that about it?

5 MR. PUZELLA: One more question, your Honor.

6 BY MR. PUZELLA:

7 Q. Mr. Rogers, what is your expert opinion in this case?

8 A. My expert opinion is irregardless of the level of profits  
9 that are identified available for disgorgement, the value of  
10 that attributable to the trademark in question would be zero.

11 MR. PUZELLA: Your Honor, if I may, we prepared  
12 demonstratives for Mr. Rogers that illustrate the calculations  
13 for a number of permutations of the factors that he just  
14 testified about, sales related to taxes, cost of goods sold,  
15 shipping, and that sort of thing.

16 If you pull them out in certain sequences, there are  
17 up to 40-plus different results that you can get. So we  
18 prepared demonstratives showing the calculations. And I  
19 understand the Court would like to move this along. I'd just  
20 offer them. If I could have an opportunity to have Mr. Rogers  
21 identify them, he doesn't need to testify to them particularly  
22 because there are so many different permutations.

23 THE COURT: You're exceeding my understanding right  
24 now.

25 MR. PUZELLA: Maybe I could ask the witness a

1 question and he could clarify.

2 THE COURT: All right.

3 MR. PUZELLA: He's the economist.

4 May I approach, your Honor?

5 THE COURT: Yes.

6 BY MR. PUZELLA:

7 Q. Mr. Rogers, I just handed you two binders with some  
8 demonstratives. Can you just describe them for us?

9 A. Yes. These are binders that are set up to identify the  
10 profits, incremental profits, available for disgorgement based  
11 on different scenarios.

12 For example, if shipping is considered a variable  
13 cost, that's in. But if it's not considered a variable cost  
14 and it's out, then another scenario would show up there.  
15 Basically, it goes through all of the iterations of if a  
16 variable cost is considered that's a valid variable cost, then  
17 it's in. If it's not considered to be a valid variable cost,  
18 then it's removed. So it's just meant to be a summary off  
19 that.

20 And there's two binders. One is for all UPCs, and  
21 the second one would be just for these 197 UPCs.

22 Q. Did you prepare those calculations yourself?

23 A. I did.

24 Q. Did you prepare them using the same documents that you  
25 just offered testimony about?

1 A. I did.

2 MR. PUZELLA: We'd offer them, your Honor.

3 THE COURT: Sir?

4 MR. PUZELLA: We'd offer the exhibits, your Honor.

5 THE COURT: They're received.

6 (Defendant's Exhibit DX 2 and DX 3 received)

7 MR. PUZELLA: No further questions.

8 THE COURT: You don't have any cross, do you?

9 MR. ADAMS: Just a little bit, your Honor.

10 THE COURT: Okay. Cross-examination.

11 CROSS-EXAMINATION

12 BY MR. ADAMS:

13 Q. Mr. Rogers, you just testified that you're familiar with  
14 Dr. Van Liere's report; is that correct?

15 A. That's correct.

16 Q. And you testified that you based your conclusions  
17 regarding the apportionment solely on Dr. Van Liere's report,  
18 correct?

19 A. That's correct.

20 Q. In other words, you have no independent expertise on this  
21 issue whatsoever, correct?

22 A. Oh, I have expertise in determining apportionment.

23 Q. In determining trademark value in the manner you just  
24 described.

25 A. I have experience in apportioning value in trademark

1 matters. In this case, I relied on Dr. Kent Van Liere's  
2 survey.

3 Q. And not on your own experience, if any, correct?

4 A. Of course, my experience is included in my testimony and  
5 my analysis and my opinion. But Dr. Kent Van Liere's survey  
6 is a key component of that.

7 Q. You're not here to offer any opinion on the Court's  
8 finding that Wal-Mart's infringement was willful, are you?

9 A. That's correct.

10 Q. You stated in your deposition that your job was to  
11 identify the economic benefit to Wal-Mart as a result of its  
12 infringement of The Backyard trademark; is that right? On  
13 page 25 of your deposition.

14 A. The economic benefit measured by the profits associated,  
15 that's correct.

16 Q. And you concluded, based on Dr. Van Liere's report, that  
17 there was zero and no economic benefit to Wal-Mart resulting  
18 from its use of The Backyard trademark, correct?

19 A. Again, the value attributable to the trademark in question  
20 would be zero.

21 Q. In your report of October 2015, you state,  
22 "Dr. Poindexter," who is Variety's expert, "ignore's the key  
23 issue, which is whether there is any economic benefit to using  
24 Backyard Grill's design and provides no facts or data to  
25 support his assumption that there is any such benefit.



1 Dr. Van Liere's consumer research study provided the only data  
2 on this issue and concludes that there is no such benefit."

3 Is that correct?

4 A. Yes, sir, that's correct.

5 Q. And the economic benefit to Wal-Mart, if any, resulting  
6 from its use of The Backyard trademark would be some  
7 indication of the value to Wal-Mart of being able to use the  
8 trademark, which you have concluded is zero; isn't that right?

9 A. That's correct. I determined that there are other factors  
10 that would be associated with the profit.

11 Q. But when Dr. Van Liere was questioned in his deposition,  
12 he was asked:

13 "You're not measuring the relative value of the  
14 Backyard brand as it relates to any benefit received from  
15 Wal-Mart, right? That's not included within your research or  
16 conclusions?"

17 And do you remember what Dr. Van Liere's answer was  
18 from your reading of the deposition?

19 A. I also heard his answer this morning, so yes.

20 Q. He's not offering an opinion; is that correct?

21 A. Yes.

22 Q. Also he was asked in his deposition, Dr. Van Liere was:

23 "You haven't disclosed any opinion in your reports,  
24 right, to offer any opinion regarding what portion of the  
25 profits would be attributable to different pieces of

1 information or other factors, for that matter? I didn't see  
2 it in your report."

3 Dr. Van Liere's answer was: "Yes, I agree with you.  
4 I did not -- I was not asked to offer an opinion on how to  
5 apportion profits to the attributes on that list. I think  
6 that's what you asked me."

7 And then the question asked to Dr. Van Liere was:  
8 "And you're not going to offer that opinion at trial, right?"

9 "I don't understand that as part of my assignment, as  
10 I sit here today.

11 "So you're aware not going to offer an opinion as to  
12 whether there would be a potential correlation between the  
13 'importance' of a particular feature in connection with a  
14 purchasing decision to a certain percentage of the profits  
15 that would be attributable to a particular piece of  
16 information, right? That's not something you're going to  
17 offer?"

18 And then Dr. Van Liere agreed with that statement,  
19 didn't he?

20 MR. PUZELLA: Objection, your Honor.

21 THE COURT: Overruled.

22 BY THE WITNESS:

23 A. I don't have that deposition in front of me. But I  
24 believe it says what it says.

25

1 BY MR. ADAMS:

2 Q. Is there anything else on which you base your opinion,  
3 other than Mr. Van Liere's survey, on which you claim your own  
4 personal expertise?

5 A. No. Dr. Kent Van Liere's survey that I relied on that  
6 shows that says that there's no importance to the name -- that  
7 consumers put no importance to the name in their purchasing  
8 decision that carry these products.

9 Q. Now, you deducted a certain amount as to what you referred  
10 to as international sales; is that correct?

11 A. That's right.

12 Q. What did you mean by that exactly?

13 A. For the online sales, there are -- I believe there are  
14 41 countries that are listed in the document that shows sales  
15 of products into those 41 international countries, and I think  
16 it's like 140-some-odd-thousand dollars of sales.

17 Q. From where did the shipments take place?

18 A. I don't know. I don't know.

19 Q. Well, if the sales took place -- or the shipments took  
20 place from a Wal-Mart from the United States into these  
21 foreign countries, is it your testimony that that doesn't have  
22 any trademark significance, the fact that Wal-Mart has  
23 infringing -- willfully infringing products in its warehouse  
24 that it ships out of the country? Is that your testimony or  
25 not?

1 A. I identified the sales associated that would have had, in  
2 my opinion, any relationship to the trademark in question. So  
3 the fact that Wal-Mart is making an international sale and  
4 they don't have an Internet store presence and they only have  
5 stores located in 16 states, they would not have ever been  
6 able to make an international sale. That's my opinion.

7 Q. Now, you were asked a lot of questions about correlating  
8 between values and determining deductions between grills and  
9 accessories. Let's look at the SG&A for just a moment.

10 You testified that there's a couple of ways at least  
11 to determine SG&A; is that correct?

12 A. That's correct.

13 Q. One way you can do it is by an accounting method, correct?

14 A. An account-by-account basis.

15 Q. Yes. You can take the various line items that appear in  
16 an SG&A analysis, and you can ask someone who has knowledge,  
17 in this case of the sale of Backyard-branded products, on an  
18 item-by-item basis, well, what effect would a sale of one more  
19 Backyard-branded product have on this number? Now, that  
20 person could answer that question one of three ways, correct?  
21 He can say it would have no effect on the cost, incremental  
22 cost, or he could say it would vary in proportion to the  
23 incremental cost, or it could be a partial variation,  
24 somewhere between those two, correct?

25 A. Correct.

1 MR. PUZELLA: Objection.

2 BY MR. ADAMS:

3 Q. But you didn't do any of that, did you?

4 A. No.

5 Q. You never sat down with a Wal-Mart employee and said tell  
6 me about the products that are involved in this lawsuit,  
7 Backyard Grills and related accessories? You never did that,  
8 did you?

9 A. I did have the conversations --

10 Q. I'm talking about SG&A. In determining sales and related  
11 expenses, you didn't do the account-by-account process you  
12 just described, did you?

13 A. That information was not available to me.

14 Q. All right. Well, you could have found somebody that could  
15 have answered these questions, correct?

16 A. Uhm.

17 Q. There's somebody at Wal-Mart who could have answered the  
18 question: What effect would this additional factor have on  
19 the incremental SG&A on this particular product? You could  
20 have done that?

21 MR. PUZELLA: Objection. Compound.

22 THE COURT: Overruled.

23 BY THE WITNESS:

24 A. I guess, theoretically, that is possible.

25

1 BY MR. ADAMS:

2 Q. Have you ever done that before in another case?

3 A. Yes, with companies that are much smaller in nature.

4 Q. So it's the size of Wal-Mart that was the disqualifying  
5 factor here?

6 A. Not necessarily the particular size of Wal-Mart. I think  
7 I testified that companies of any size, that's a difficult  
8 analysis to conduct. So in those cases, regression analysis  
9 is an appropriate method.

10 Q. Leaving aside the question of regression analysis, we'll  
11 come back to that.

12 Let's talk for a minute about what these line item  
13 accounts would be. So, for example, store operations, you  
14 would have things like rent, correct?

15 A. Rent would be in there.

16 Q. Right.

17 Could you tell the Court what the variation in rent  
18 was to Wal-Mart based on the variation in costs attributable  
19 to the sale of Backyard-branded products?

20 A. I testified that I did not do an account-by-account basis.  
21 So I did not look at it from an individual line-item basis.

22 Q. But you wouldn't expect the rent to change, would you?

23 A. The portion of the rent associated with the products in  
24 question, whether it be a distribution center or a store  
25 level, that would vary with the amount of footprint they

1 potentially could take.

2 Q. We're talking about what the effect would be for the sale  
3 of additional Backyard-branded products.

4 And, by the way, what percentage of all of Wal-Mart's  
5 sales do these Backyard-branded products comprise?

6 A. I don't know the exact percentage, but it's a small  
7 percentage.

8 Q. It's .07 percent, isn't it, 7/100ths of 1 percent?

9 A. I have not done that calculation, but I'll trust you.

10 Q. A very tiny number, correct?

11 A. That's correct.

12 Q. Well, how much would the utilities vary of the sale of  
13 Backyard products? Can you explain why, if Wal-Mart sold one  
14 additional Backyard product, it would have any additional  
15 utility bills to pay?

16 A. Again, I didn't look at the account-by-account level, but  
17 utilities could vary depending on whether or not warehouse  
18 space is being used, whether or not they keep the utilities on  
19 or turn them off during certain of the day, whether or not you  
20 turn the heat up certain times of the day, that has a variable  
21 component.

22 Q. You could have asked the questions of somebody at Wal-Mart  
23 to determine that, couldn't you?

24 A. Like I said, I did not do an account-by-account basis.

25 Q. You have other factors like payroll. How would the

1 payroll at Wal-Mart vary based on the sale of one more  
2 Backyard-branded product when the total universe of  
3 Backyard-branded products sold by Wal-Mart was 7/100ths of  
4 1 percent?

5 A. The payrolls can vary because --

6 Q. No, that wasn't my question. I asked if you can answer  
7 the question that I asked.

8 How much would the payroll vary in this situation  
9 regarding the sale of one additional Backyard-branded product?

10 A. Like I said, I did not do an account-by-account basis, so  
11 I can't answer that particular question.

12 Q. Does Wal-Mart have any fixed costs associated with their  
13 SG&A?

14 A. Yes, they do.

15 Q. What would their fixed costs be?

16 A. I don't know offhand.

17 Q. Give me some examples. Based on your vast experience, you  
18 must have some intimation as to what types of costs a business  
19 like this incurs that are fixed without regard to the  
20 day-to-day sales of their products.

21 A. The cost categories you mentioned would have a fixed  
22 component to them. Those would be examples of potentially  
23 fixed costs or potentially mixed fixed costs, and mixed and  
24 variable.

25 Q. Right.



1 Insurance, is that a fixed or a variable cost or a  
2 partially variable?

3 A. Again, I didn't look at it on an account-by-account basis.

4 Q. Research and development, can you say that Wal-Mart's  
5 research and development activities would vary in some  
6 relation to the number of Backyard-branded products they sold?

7 A. Yes. I could think that --

8 Q. I don't want you to assume, Mr. Rogers. I want you to  
9 tell the Court what you know as a fact or what you don't know  
10 as a fact.

11 A. I told you many times I have not done an  
12 account-by-account basis. So I don't know the particular  
13 answer to that.

14 Q. As far as information technology is concerned, would you  
15 consider that to be primarily a fixed cost or a variable cost?

16 A. Again, I would argue it could be both a fixed and variable  
17 cost. But, again, I didn't do an account-by-account basis.

18 Q. So what you're saying is it could be the case that  
19 Wal-Mart had to go out and buy a vast new computer because it  
20 sold 0.7 percent of its revenue in Backyard-branded product,  
21 so you're going to consider that a partially variable cost for  
22 purposes of this lawsuit; is that correct?

23 A. Potentially. You're looking at it on .07 or whatever  
24 number you said. That's \$910 million worth of sales. That is  
25 a significant amount of sales. So even though it might be a

1 small percentage of the overall, the fact that there's  
2 \$910 million is a significant size. Yes, I believe there's  
3 going to be some fixed and variable costs associated with the  
4 sale of those products.

5 Q. How much?

6 A. Based on the regression analysis, it turns out that I  
7 identified 18.22 percent.

8 Q. Do you know what Wal-Mart's total SG&A figures are for the  
9 years 2012 and 2016?

10 A. I'm sure that I've seen them. I don't remember offhand  
11 what they are.

12 Q. Do you not have the annual reports?

13 A. I do.

14 Q. Would you check? I think if you look in Tab 230 and 231  
15 on page 18.

16 A. 231.

17 Sorry. What page were you on?

18 Q. Page 18.

19 A. Okay.

20 Q. Just from your experience -- I'm not asking you for a  
21 specific number. Based on your experience, in a business not  
22 necessarily the size of Wal-Mart, but in a corporate  
23 enterprise, what would say the average proportion would be  
24 between fixed costs, on the one hand as we discussed it, and  
25 variable costs on the other, leaving aside the cost of goods?

1 A. I don't know. I can't answer that question.

2 Q. Give me your best estimate.

3 A. I can't give you a best estimate. I don't know the  
4 answer.

5 Q. You don't have any idea?

6 A. Every case is different. Every analysis would be  
7 different.

8 Q. All right. You say you've identified 18.22 percent of  
9 Wal-Mart's revenue as variable SG&A costs, correct?

10 A. Revenue associated with the sale of these products, yes.

11 Q. And that's in paragraph 58 of your report, correct?

12 A. I'll trust your memory.

13 Q. What's the total SG&A cost to Wal-Mart in the year 2012?

14 A. I don't see a total number.

15 Q. Do you see the 19.2 percent?

16 A. I see a percentage. I don't see a number.

17 Q. 19.2 percent, correct?

18 A. Correct.

19 Q. And yet you say that of the 19.2 percent, all but about  
20 1 percent is going to be variable cost; is that right?

21 A. Based on the regression analysis, the results show that  
22 18.22 percent, that's right.

23 Q. So all of Wal-Mart's SG&A, all of their buildings, all of  
24 their warehouses, all of their salaries for executives, all of  
25 their insurance, everything that Wal-Mart has, all but

1 1 percent is going to be variable based on the sale of these  
2 goods. Is that your testimony here?

3 A. My testimony is that the regression shows it's 18.2  
4 percent.

5 Q. What about your common sense, Mr. Rogers? Does your  
6 common sense tell you that Wal-Mart's variable cost would be  
7 all but 1 percent of its SG&A?

8 A. That's a significant component. Again, we're talking  
9 about \$910 million worth of sales.

10 Q. Let's talk about the sales.

11 THE COURT: Let me interrupt.

12 The \$910 million is the gross sales attributed to  
13 Backyard during the five-year -- roughly five-year period? Is  
14 that where that figure comes from?

15 THE WITNESS: For all U.S. states and territories,  
16 that's correct.

17 THE COURT: Yeah, okay. Again, let me just isolate  
18 it. \$910 million you say over the period that we're inquiring  
19 about --

20 THE WITNESS: That's correct.

21 THE COURT: -- in the United States?

22 THE WITNESS: That's correct.

23 THE COURT: And that is .007 of the gross sales of  
24 the defendant?

25 THE WITNESS: I don't know the exact number.

1 MR. ADAMS: It's .07. It's 7/100ths of 1 percent.

2 THE COURT: But it's not 7 percent.

3 MR. ADAMS: No.

4 THE COURT: It's 3/10ths less than 1 percent.

5 MR. ADAMS: It's 7/10ths of 1 percent.

6 THE COURT: 7/10ths of 1 percent. And so do the  
7 math, if you would. What is the gross amount of sales if  
8 that's 7/10ths of the sales? What figure would be  
9 100 percent? I come up with, like, \$100 million.

10 THE WITNESS: You have to take the number and divide  
11 it by the .07 percent.

12 THE COURT: I know, but I'm just doing it in my head.  
13 I come up with a \$100 billion. I don't know if it's close or  
14 if it's higher than that.

15 MR. ADAMS: Your Honor, I think for 2012 --

16 THE COURT: I'm talking about -- we're measuring the  
17 five-year period? Isn't that what the 910 comes from?

18 MR. ADAMS: Yes.

19 THE COURT: Let's do apples and apples.

20 MR. ADAMS: Here's your expert.

21 THE WITNESS: Well, you take the 910 divided by if  
22 it's .07. I don't have a calculator to know what that is. So  
23 910 million by 191 -- 91 billion divided by 7, if I did that  
24 right.

25 THE COURT: I mean, it looks like 91 billion, rounded

1 off to 100 billion, or, like, 20 billion a year. Is that what  
2 their sales are?

3 THE WITNESS: Their sales in 2012 were 446,000 and  
4 reporting that in millions. So that's --

5 THE COURT: This is Wal-Mart?

6 THE WITNESS: Yes, in the annual report.

7 THE COURT: Their sales are reported at what amount?

8 THE WITNESS: 446,509. But that's reported in  
9 millions. So you have to add the six zeroes.

10 THE COURT: 400 billion?

11 MR. ADAMS: Yes, it's \$444 billion.

12 THE COURT: In a year?

13 MR. ADAMS: In one year, correct.

14 THE COURT: I'm way off. So times 5 would be  
15 roughly --

16 MR. SHAW: 2.5 trillion.

17 THE COURT: Okay.

18 BY MR. ADAMS:

19 Q. Mr. Rogers, let me go at this a different way. You  
20 testified that you went to the lawn and garden segment,  
21 correct?

22 A. That's correct. That was the lowest level of financial  
23 reporting that was available to me.

24 THE COURT: Let me interrupt again because I'm trying  
25 to figure it out. 500 billion is a half a trillion?

1 MR. ADAMS: Correct.

2 THE COURT: Okay.

3 BY MR. ADAMS:

4 Q. So your testimony does not relate specifically to the  
5 products that are at issue here, correct?

6 A. That's correct. Ideally, you'd want to have a profit and  
7 loss statement, particularly for the products in question. My  
8 understanding is that that's not available, and the lowest  
9 level of financial reporting available -- I would include  
10 these products -- are at the product segment level.

11 Q. You say it's not available because you didn't ask for  
12 anyone at Wal-Mart to generate such a report, did you?

13 A. I wanted the numbers that were provided in the normal  
14 course of business, and my understanding is that's the number  
15 they've got.

16 Q. You realize this case doesn't involve Wal-Mart's entire  
17 lawn and garden business, do you?

18 A. No, sir.

19 Q. It involves a subset of that?

20 A. That's correct.

21 Q. What types of products does the lawn and garden segment  
22 include?

23 A. I don't know offhand. But I could take a guess that it  
24 would include garden type of equipment, hoses and other  
25 things. I don't know the answer to that particular question.

1 Q. It could be lawn mowers. It could be live plants. It  
2 could be things that have wildly different variable costs from  
3 the grills and accessories that we're talking about here,  
4 correct?

5 A. They could be different. I don't know about wildly.

6 Q. Rather than asking Wal-Mart or somebody at Wal-Mart to do  
7 a study directed specifically at these products, you simply  
8 used the total lawn and garden business in the aggregate  
9 instead, right?

10 A. From my experience, it's appropriate to use the  
11 documents --

12 Q. Answer the question, Mr. Rogers. Yes or no.

13 A. I'm trying to answer the question.

14 Q. Yes or no. You don't need to explain your answer.

15 A. Could you ask your question again.

16 MR. ADAMS: Could the court reporter read back the  
17 question, please.

18 (Record read.)

19 THE WITNESS: That's correct. I did not ask anybody  
20 to do a study.

21 MR. ADAMS: Thank you.

22 BY MR. ADAMS:

23 Q. Now, what are some of the other elements of Wal-Mart's  
24 costs that make up SG&A? You mentioned a few. You mentioned  
25 payroll. You mentioned rent. You mentioned utilities,



1 software, healthcare. You haven't been able to associate any  
2 of those particular costs with variation based on the sale of  
3 these products.

4 What about attorneys' fees, Mr. Rogers? How would  
5 the sale of Backyard products vary the cost to Wal-Mart with  
6 its attorneys' fees?

7 A. I told you I didn't do an account-by-account basis. I  
8 understand how attorneys' fees could vary depending on the  
9 types of legal work a product might need. But I did not do an  
10 account-by-account basis.

11 Q. If Wal-Mart gets sued for trademark infringement, you  
12 might expect their legal fees to go up; might you not?

13 A. I would assume they would incur costs for that. I don't  
14 know if they'd go up or stay the same from year to year.

15 Q. So isn't it your testimony here that you're actually  
16 asking, in an indirect way, for Variety to pay Wal-Mart's  
17 attorneys' fees in defending this case, aren't you, by the way  
18 you calculated this number?

19 A. That's not the purpose of the analysis and the way I did  
20 it.

21 Q. I'm not asking what the purpose was. I'm asking what the  
22 result is.

23 The way you analyzed this, attorneys's fees is a  
24 product or a component of SG&A, isn't it?

25 A. I don't know particularly. I don't know the answer to

1 that question.

2 Q. If it didn't fall in SG&A, Mr. Rogers, what category would  
3 it fall into?

4 A. There could be other categories listed below.

5 Q. Not could be.

6 You're an expert, Mr. Rogers. What category does  
7 attorneys' fees fall into in the typical course of business  
8 like Wal-Mart? Is it SG&A or is it something else?

9 A. It could be either.

10 Q. I'm not asking you whether it could be something. I want  
11 to know whether you know the answer to the question, not  
12 speculation.

13 A. I'm answering the question. I've seen instances where  
14 companies report it in their SG&A. I've seen companies that  
15 don't report it in their SG&A.

16 Q. And how does Wal-Mart report it?

17 A. I didn't ask that particular question.

18 Q. So if it is the fact that their attorneys' fees are  
19 considered part of their sales, general and administrative  
20 costs, then the effect of your testimony is that Variety is  
21 going to be taxed with some portion of Wal-Mart's expense in  
22 defending their case here; is that correct or not?

23 A. Like I said, I didn't do an account-by-account basis.

24 Q. Okay. Taxes. What tax rate did you come up with for  
25 Wal-Mart?

1 A. I don't remember a particular number, but I think it's  
2 around 30-some-odd percent.

3 Q. Okay.

4 A. 32, maybe. I'm not sure of the exact number.

5 Q. Now, let's just take a hypothetical and let's just  
6 hypothetically assume that there's a disgorgement of a gross  
7 amount of \$250 million. Okay?

8 According to you, your analysis, you're going to  
9 deduct 30-some percent of that amount from the disgorgement,  
10 and the rationale is that Wal-Mart's going to have to pay tax  
11 on that, correct?

12 A. The rationale is that they have already paid taxes on  
13 that.

14 Q. So Variety's award is reduced by that amount, correct?

15 A. The profits that are available for disgorgement include  
16 that deduction.

17 Q. Now, what does Wal-Mart do with that tax deduction, with  
18 that deduction from the disgorgement number?

19 A. I don't understand your question.

20 Q. Doesn't it turn around and deduct it from its own taxes as  
21 a business expense? A judgment in a lawsuit would be a  
22 business expense and Wal-Mart would claim it as a tax  
23 deduction, correct?

24 A. I'm not a tax attorney. I don't know the answer to that  
25 question. From an economic perspective, taxes were paid on

1 the sale of \$910 million, so it's appropriate to identify it  
2 as a variable cost.

3 Q. So you deducted taxes without knowing whether or not  
4 Wal-Mart was actually going to deduct those taxes or not,  
5 correct?

6 A. I deducted those costs because they were costs paid for  
7 the sale of those products.

8 Q. You don't know how Wal-Mart was going to treat that  
9 deduction, correct?

10 A. That's correct.

11 Q. Now, when you rendered your original report, that was  
12 before the Court entered its summary judgment opinion in  
13 December of 2015; is that right?

14 A. Yes, I believe that's right.

15 Q. And then this report was entered, I think, on October 16,  
16 2015; is that right?

17 A. I think that sounds right.

18 Q. So you provided in your original report a very long number  
19 of explanations of your understanding of the law of trademarks  
20 and damages and profits; didn't you?

21 A. I put information in my report, and it's included in the  
22 background section, that gives me an idea or the framework to  
23 work under in identifying the monetary recovery in a damages  
24 case.

25 Q. You stated in Footnote 1 of your report that -- those case

1 citations and statements of the law that you put in your  
2 original report, you said you got those from counsel, correct?

3 A. I don't know exactly how many I would have gotten from  
4 counsel, but I got a number of those from my own experience.  
5 I have a number of case law in my own files that I utilize  
6 from case to case. I don't know how many would have been from  
7 my own files and how many would have been provided to me.

8 Q. You didn't say in your expert report that any of those  
9 cases came from your own files, did you?

10 A. No.

11 Q. Isn't it a fact, Mr. Rogers, that when you prepared your  
12 original report you were given a long list of cases with  
13 purported holdings of those cases which you plugged into your  
14 report; isn't that right?

15 A. That's not necessarily correct.

16 Q. Is it correct or not?

17 A. I told you it was not correct. I told you I have a large  
18 number of cases in my own file that I used for the last  
19 20 years and I use from case to case to set up the background  
20 of the report that gives the foundation of which I'm doing my  
21 work.

22 Q. But you didn't exclude any of those case citations based  
23 on your own review of those cases, did you?

24 A. I don't understand what you mean.

25 Q. Well, did you read the cases that Wal-Mart's counsel gave

1 you to see if they said what it was purported they said?

2 A. I don't know which cases were given to me by Wal-Mart and  
3 which ones I had in my own file. But I would have reviewed  
4 the files. In any case that would have gone in there, I  
5 reviewed the language in the case. But I'm not a legal  
6 expert. I'm not here to talk about a legal opinion at all.  
7 It's just set up to be a framework on how I do my work.

8 Q. Fair enough.

9 But you haven't considered the significance of the  
10 Court's finding of willful infringement in connection with any  
11 of your opinions, have you?

12 A. That's correct.

13 Q. If it is, in fact, the case that -- whether infringement  
14 is willful or not matters, then all of your opinions may be  
15 irrelevant; isn't that true?

16 A. I don't know if that's necessarily the case. Again, I'm  
17 not a legal expert. But the damages that I identify in a  
18 case, when I'm looking at it, the damages, whether it's a  
19 patent, trademark, or whatever, I am not looking at whether or  
20 not it's a willful infringement or not. I'm just looking at  
21 what are the damages associated with the infringement, the  
22 alleged infringement.

23 Q. You testified that you based your assumption on the data  
24 starting in early October of 2011; is that correct?

25 A. That's correct.

1 Q. Why did you do that?

2 A. The information I received and deposition testimony that  
3 identified that the start of first sales was on October 8th of  
4 2011.

5 Q. Were you furnished by Wal-Mart a declaration under penalty  
6 of perjury by Mr. Kovach that purported to state the sales of  
7 Backyard Grills beginning on January 1, 2011?

8 A. I received an affidavit, but my understanding of the  
9 affidavit is the sales associated started January 1st for the  
10 375 UPCs that were identified.

11 Q. How were these products identified on that report?

12 A. By UPC number.

13 Q. Didn't they also have a BYG designation on the left-hand  
14 side down the column?

15 A. They had a description, and there's a large number of them  
16 that did not have BYG in their description.

17 Q. There were a lot that did, right?

18 A. That were 375 of them, yes. There were a number of the  
19 375 that did not.

20 Q. But you simply ignored Mr. Kovach's declaration under  
21 penalty of perjury at Wal-Mart's counsel instruction, right?

22 A. Again, my understanding of Mr. Kovach's declaration is  
23 that he was identifying the sales based on 375 UPCs. I did  
24 ask the question as far as why sales went back to January 1  
25 based on the report, and the answer I got was that Wal-Mart

1 reuses their UPCs. So it would not be unusual for the UPCs to  
2 be reused and show up in a report when they're just pulling  
3 the data based on UPCs.

4 I can clarify that number when I go to the column  
5 that's entitled the "Item Create Date" in the same report. If  
6 you look at the item create date, some of the item create  
7 dates are as early as 2002. So if the item was created in  
8 2002, they can have no relation to the trademark in question  
9 here.

10 Q. How do you explain Mr. Kovach's declaration under penalty  
11 of perjury that these were sales of Backyard Grills?

12 A. I think I told you, my understanding of the declaration is  
13 that he pulled 375 UPCs, regardless, just pulled 375 UPCs  
14 starting January 1st.

15 Q. Are you familiar with the trademark Mainstays?

16 A. Not by that term, no.

17 Q. Have you ever heard of that trademark?

18 A. The name of the trademark?

19 Q. Yes.

20 A. No.

21 Q. Are you aware that before Wal-Mart started selling  
22 Backyard Grills and accessories, they used the trademark  
23 Mainstays on some of the same products?

24 A. I don't know the answer to the question.

25 Q. On your expert report, you identify several what are



1 called Luci, L-u-c-i, reports furnished to you by Wal-Mart.

2 Do you recall that?

3 A. Luci report, I don't remember that.

4 Q. Can you find your original report, Mr. Rogers?

5 A. I don't think I have it.

6 MR. ADAMS: Counsel, have you furnished Mr. Rogers  
7 his expert report?

8 MR. PUZELLA: I don't know that I have it.

9 In the interim, your Honor, beyond the scope of  
10 direct.

11 THE COURT: I couldn't hear you. You were too close  
12 to the microphone.

13 MR. PUZELLA: I apologize. Objection. Beyond the  
14 scope of direct. I didn't ask him about these issues.

15 THE COURT: It's impeachment.

16 MR. PUZELLA: May I approach, your Honor?

17 THE COURT: Yes.

18 BY MR. ADAMS:

19 Q. Mr. Rogers, your counsel has handed you a copy of your  
20 original expert report. Are you looking at page 73? If not,  
21 would you please turn to page 73?

22 A. I'm on 73.

23 Q. Exhibit B, Mr. Rogers, page 73 at 116.

24 A. I see it.

25 Q. Look down near the bottom beginning with Wal-Mart 00748,

1 and there are four entries. It says, "Excerpt from Luci  
2 survey."

3 A. Okay.

4 Q. What information did you glean from your review of those  
5 four documents and how did it affect your opinion, if at all?

6 A. Well, the listing on Exhibit B is meant to identify all  
7 the documents that I would have in my file. It doesn't  
8 necessarily mean I would have used them in any way in the  
9 calculation or in my overall opinion.

10 I remember reviewing these. But, again, at the end  
11 of the day, my analysis or opinion is based on the independent  
12 survey that was conducted by Dr. Van Liere.

13 Q. Were you told by Wal-Mart that they had conducted surveys  
14 to determine the desirability of The Backyard trademark in  
15 relation to the other trademarks before they selected The  
16 Backyard trademark?

17 A. I don't remember in particular. I just know that there  
18 were these surveys in the record.

19 Q. Were you told that consumer surveys by Wal-Mart showed  
20 The Backyard trademark ranked significantly higher than its  
21 existing Mainstays trademark for grilling items?

22 A. I was not specifically told that.

23 Q. Referencing these Luci reports, were you told that  
24 The Backyard trademark was considered to be "best fitting" as  
25 a name for grilling items by 49 percent of the respondents

1 compared with 48 percent who said that Mainstays was the least  
2 fitting? Were you told that?

3 A. I don't know if I was particularly told that.

4 Q. Did you see that when you reviewed these Luci reports that  
5 you've identified in your expert report?

6 A. Well, I would have had access to them, yes.

7 Q. Do you recall, reading that analogy, being refreshed?

8 A. I remember some conversation around that. Again, at the  
9 end of the day, I used the independent survey that was  
10 provided. In my line of work, it's better to use a survey  
11 that's conducted independently as opposed to a customer-driven  
12 survey -- I mean, a Wal-Mart driven survey in this case  
13 because they're not necessarily asking the right questions  
14 that I need to get to as far as what's the appropriate profit  
15 to attribute to the trademark in question.

16 Q. Mr. Rogers, were you told, when asked which name would fit  
17 best for a line of grilling items sold at Wal-Mart, 40 percent  
18 of the Luci surveys chose Backyard as one of the top three  
19 choices but only 9 percent chose Mainstays? Do you recall  
20 learning that during your investigation?

21 A. I don't know if I knew that or not.

22 MR. PUZELLA: Objection, your Honor.

23 THE COURT: Overruled.

24 BY MR. ADAMS:

25 Q. Mr. Rogers, were you told which name would most likely

1 cause a customer to purchase a grill based on name, 42 percent  
2 of Wal-Mart's survey respondents ranked Backyard as one of the  
3 top three choices likely to be purchased compared to only  
4 8 percent for the Mainstays?

5 MR. PUZELLA: Beyond the scope.

6 THE COURT: Overruled.

7 THE WITNESS: I'm not a survey expert. I don't know  
8 how the surveys were put together. I don't know the answer to  
9 that question.

10 BY MR. ADAMS:

11 Q. You don't know whether this was an independently conducted  
12 survey or not, do you?

13 A. I didn't ask.

14 Q. It could have been an independently conducted survey for  
15 Wal-Mart?

16 A. It could have been. My understanding is these were  
17 internally generated.

18 Q. Are you familiar with a company calls MAPS?

19 A. Not specifically, no.

20 Q. Did you learn in your research, including your review of  
21 the Luci survey, that MAPS an independent company that's  
22 contracted for with Wal-Mart?

23 A. I don't know the answer to that question.

24 MR. ADAMS: No further questions of the witness.

25 THE COURT: Are you finished with the witness?

## 1 REDIRECT EXAMINATION

2 BY MR. PUZELLA:

3 Q. Mr. Rogers, a few moments ago, there was some discussion  
4 concerning some math that you were doing in your head. Do you  
5 recall that?

6 A. Yes.

7 Q. Do you recall in connection with that there was a figure  
8 that was presented of \$910 million? Do you recall that?

9 A. Yes.

10 Q. The \$910 million that was referenced to there, that is  
11 revenue, not profit, correct?12 A. Revenue for the product, that's correct, in all states and  
13 territories.

14 Q. It's not profit?

15 A. That's correct. It's revenue only.

16 MR. PUZELLA: Just one housekeeping matter, your  
17 Honor. With respect to the last two exhibits that I offered  
18 and that were were received, I just neglected to give the  
19 numbers. It was DX2 and DX3.20 THE COURT: All right. We're going to have a  
21 10-minute recess, and be ready with your next witness when you  
22 come back.

23

24

25

1 MR. PUZELLA: Thank you, your Honor.

2 (Defendant's Exhibit 2-3 received.)

3 (Short recess.)

4 THE COURT: Call your next witness, please.

5 MS. GARKO: Your Honor, Wal-Mart calls

6 Mr. Marvin Dishommes.

7 MR. ADAMS: Your Honor, we have an objection to this  
8 witness and would like to be heard before he begins his  
9 testimony.

10 THE COURT: Who is the witness?

11 MS. GARKO: Marvin Deshommes. He's a fact witness  
12 for Wal-Mart.

13 THE COURT: What's the objection?

14 MR. ADAMS: Your Honor, Mr. Deshommes is one of the  
15 witnesses that we've identified in our motions in limine as  
16 not having been identified to us during the discovery period  
17 in this case.

18 The original initial disclosures submitted by  
19 Wal-Mart identified two individuals, Karen Dineen and  
20 Matt Kovach. Discovery in this case ended on August 4, 2015.  
21 In February of 2016, Wal-Mart submitted what they called  
22 supplements to their initial disclosures. One of the  
23 witnesses they identified in their long list of new witnesses,  
24 one of the witnesses they identified is the witness they  
25 intend to call.

1           He's the vice president, divisional merchandise  
2 manager for seasonal products, and it says that Mr. Deshommes  
3 has knowledge concerning Wal-Mart's design, development,  
4 selection and use of Backyard Grill plus design mark. He also  
5 has knowledge about facts and communications relating to the  
6 consideration, design and development of The Backyard Grill  
7 and design mark. He also has knowledge about the facts and  
8 communications regarding trademark searches, analysis, legal  
9 clearances for The Backyard Grill and design mark. He also  
10 has knowledge about the role of licensed brands and branding.

11           Now, this witness is objectionable on several  
12 grounds. First of all, as I said, he wasn't identified during  
13 the discovery period as a fact witness. Secondly, the  
14 documents that they have produced -- and there are some that  
15 have Mr. Deshommes' name on them -- are heavily redacted.  
16 Wal-Mart to this day maintains an attorney-client privilege  
17 claim as to much of what's in Mr. Deshommes' testimony as --  
18 well, not testimony, but the documents they have produced.

19           Furthermore, they've produced no documents relating  
20 to Mr. Deshommes since they identified him on this  
21 supplemental initial disclosure document six months after  
22 discovery ended.

23           So for those reasons, it would be highly prejudicial  
24 to us to have this witness testify. These subject matters,  
25 particularly the legal clearances of The Backyard design mark,

1 were core testimony and evidence that were -- that was  
2 presented based on Ms. Dineen's testimony in which the Court  
3 relied in finding that Wal-Mart had willfully infringed the  
4 trademark.

5           It seems like Mr. Deshommes has been brought here to  
6 testify, well, maybe it wasn't so willful after all, but he's  
7 relying apparently on either documents that have been highly  
8 redacted based on a bogus attorney-client privilege claim or,  
9 secondly, documents that we've never seen. Because there's  
10 not been one single additional document produced regarding any  
11 of these witnesses since the supplemental additional  
12 disclosure was filed earlier this year. For that reason, we  
13 object to Mr. Deshommes' testimony in its entirety.

14           THE COURT: Have you deposed this witness?

15           MR. ADAMS: We have not. He was identified to us  
16 several months after the close of discovery.

17           THE COURT: I'll sustain the objection.

18           MS. GARKO: Your Honor, may I be heard briefly?

19           THE COURT: Okay.

20           MS. GARKO: Your Honor, with respect to the complaint  
21 regarding timeliness, Mr. Deshommes was disclosed in  
22 February -- I'm sorry -- in January of 2016. He was then  
23 offered for deposition beginning at the end of February 2016.  
24 There have been months and months during which Variety could  
25 have elected to take his deposition, and he was made available



1 for deposition, and elected not to do so, and that was their  
2 decision.

3 This is the first we're hearing of any compliant  
4 about documents not being produced. If Mr. Deshommes is  
5 permitted to testify today, the only documents he is going to  
6 testify to are three documents that have been produced and  
7 were produced long ago, I believe, in the Trademark Trial and  
8 Appeal Board action. So there's no documents that he's going  
9 to talk about that they haven't seen or haven't seen for a  
10 long period of time.

11 They elected not to depose him. That is not our  
12 fault, after having disclosed him months and months and months  
13 ago. Accordingly, we don't believe there's actually any  
14 prejudice to Variety for having Mr. Deshommes testify today.

15 Secondly, to be clear, Mr. Deshommes is not here to  
16 testify about any advice from legal or any of the searches or  
17 clearances or anything like that. Mr. Deshommes is here to  
18 talk about apportionment and he's here to talk about  
19 Synergistic factors related to diversion of sales.

20 He's here to discuss the fact that what is driving  
21 the sales of The Backyard Grill products. If allowed to  
22 testify, he's going to testify that it's not the brand but  
23 other factors, specifically, pricing features. And that's the  
24 content of his testimony. We'd ask that he be allowed to  
25 testify at this time.

1 MR. ADAMS: I heard your Honor sustain the objection.

2 MS. GARKO: Then we have a proffer we'd like to hand  
3 up concerning Mr. Deshommes' testimony for the purposes of  
4 what his testimony would have consisted of.

5 THE COURT: Okay.

6 MS. GARKO: May I approach, your Honor?

7 THE COURT: Yes.

8 What's the effect of a proffer? I mean --

9 MR. ADAMS: Well, I'd like to have a copy of it.

10 THE COURT: Well, I mean, the proffer could be loaded  
11 with inflammatory material, and then you go to the court of  
12 appeals and they say, oh, my goodness, imagine having this  
13 evidence not admitted because it's been proffered. I think  
14 you have the right to at least examine the proffer and object  
15 to it.

16 Do you understand what I'm saying? It's a formula  
17 for being totally blindsided by a panel in the court of  
18 appeals.

19 MR. ADAMS: I understand, your Honor. Since I've  
20 seen this proffer for the first time about 30 seconds ago --

21 THE COURT: Well, I mean, during the course of the  
22 trial or at the end of the trial, you can reserve the right to  
23 object to it --

24 MR. ADAMS: Very well.

25 THE COURT: -- to anything, but I'll receive it

1 conditionally at this time.

2 MR. ADAMS: Very well, your Honor.

3 MS. GARKO: Thank you, your Honor. The next witness  
4 we would call is David Ortiz.

5 MR. ADAMS: Your Honor, same objection. Mr. Ortiz  
6 was not known to us prior to this supplemental initial  
7 disclosure, which was filed many months after the close of  
8 discovery.

9 I'll address just briefly the point made about  
10 discovery. I mean, we took the Court's order setting the  
11 discovery period quite seriously. In particular, since there  
12 was an initial Trademark Trial and Appeal Board proceeding,  
13 there was plenty of time during the discovery period for these  
14 witnesses to be identified to us.

15 This was after -- this was after the summary judgment  
16 order, and that tells a lot about what's going on here. You  
17 may have heard me mention at an earlier hearing the fact that  
18 we thought, and still do, that Wal-Mart was here to do over  
19 the summary judgment order. And the type of witnesses they're  
20 offering here, I think, is proof of that.

21 Mr. Ortiz, if, in fact, he has important information  
22 about Wal-Mart's design, development, selection and use of The  
23 Backyard Grill, he should have been identified right up front,  
24 along with Ms. Dineen and Mr. Kovach, so we could have deposed  
25 him and so the Court could have had the benefit of his

1 testimony and knowledge before your Honor ruled on the summary  
2 judgment motion. Now they're here trying to unwind it.

3 I have a feeling I know what Mr. Mr. Ortiz is going  
4 to say. We object for the same reason we just objected to  
5 Mr. Dishommes' testimony. He was identified out of discovery  
6 and there have been no documents produced regarding  
7 Mr. Ortiz's testimony. Based on his job description, there  
8 must have been hundreds, if not thousands, of emails flowing  
9 back and forth between them, manufacturers, people in the  
10 branding team about this whole scheme to take Backyard off the  
11 shelves and substitute something else and then see what the  
12 result in the sales was. Nothing like that has been produced  
13 to us, and we strongly object to it.

14 THE COURT: Why is this any different from the last  
15 witness?

16 MS. GARKO: For two reasons, your Honor. One thing I  
17 would just note with respect -- and I did not raise this  
18 previously with respect to Mr. Deshommes, but it is true for  
19 him as well, that those opinions were specifically identified  
20 in response to an order from Magistrate Judge Swank --

21 THE COURT: I'm sorry.

22 MS. GARKOK: They were specifically identified in  
23 response to an order from Magistrate Judge Swank when, after  
24 the summary judgment hearing, there was a discussion about  
25 what additional discovery needed to take place. As part of

1 that, there were certain topics on which discovery was  
2 ordered. These witnesses were identified --

3 THE COURT: Who ordered the additional discovery?

4 MS. GARKO: The magistrate judge.

5 THE COURT: How did it get to the magistrate if I was  
6 the judge ruling on it? That's shock to me.

7 MR. ADAMS: Your Honor, that's just simply not the  
8 case. With all respect to Wal-Mart's counsel, that's just not  
9 the case.

10 THE COURT: It would be highly irregular for a  
11 magistrate judge to have some material ruling in a case that  
12 is in front of me. I just don't -- that doesn't happen.

13 MR. ADAMS: There was a hearing before Judge Swank  
14 that had to do with attorney-client privilege. In other  
15 words, we took the position -- we saw what was coming after  
16 the grant of the summary judgment order, we saw what Wal-Mart  
17 was going to attempt to do. That is, they wanted to redo the  
18 whole issue of willfulness. They recognized what a serious  
19 issue it was.

20 So we made an attempt to -- we argued that the  
21 documents -- and there were dozens, if not hundreds of them,  
22 that had been withheld on the grounds of attorney-client  
23 privilege. They waived that privilege. We went down and  
24 argued this before Judge Swank, and she upheld Wal-Mart's  
25 privilege claim, and so at that point we waived it. We said,

1 all right, if the privilege claim is going to be upheld, then  
2 fine, but that subject is closed --

3 THE COURT: There isn't anything that a magistrate  
4 can do that I can't undo.

5 MR. ADAMS: Correct. But be that as it may, we made  
6 a calculated decision to get to trial. The way Wal-Mart was  
7 behaving, we had no way of knowing whether this thing may  
8 stretch on for more months and years if we got bogged down in  
9 an attorney-client privilege dispute.

10 THE COURT: How unlikely was that if I was the trial  
11 judge?

12 MR. ADAMS: I don't know, your Honor.

13 THE COURT: I do.

14 MR. ADAMS: I can't answer that.

15 The fact is, though, that we dropped the whole  
16 attorney-client privilege issue.

17 THE COURT: What's the consequence of that?

18 MR. ADAMS: Well, the consequence of it is they're  
19 now bringing these witnesses here to testify about things,  
20 number one, about what few documents were produced were either  
21 produced heavily redacted or simply identified without the  
22 document being produced at all.

23 I'm quite certain, without specifically knowing, that  
24 Mr. Ortiz must have documents that have been generated in the  
25 past four to five months that have not been identified to us

1 and we have no knowledge of, and yet he's proposed to be  
2 testifying here about the design, development, selection and  
3 use of The Backyard Grill plus design mark. That was  
4 something that we got testimony from Ms. Dineen from two years  
5 ago.

6 It's too late and it's prejudicial to Variety to have  
7 this witness here in these circumstances.

8 THE COURT: How many witnesses are we talking about?  
9 We're going through them seriatim now. Is this the only other  
10 one for which there's an objection or is there a whole string  
11 of them?

12 MS. GARKO: My understanding with respect to the  
13 Wal-Mart fact witnesses is these are the only two for which  
14 there's an objection.

15 May I be heard briefly with respect to counsel's  
16 points?

17 THE COURT: Yes.

18 MS. GARKO: With respect to Mr. Ortiz, his  
19 involvement with respect to The Backyard Grill and design  
20 brand comes later in the process, particularly after this  
21 Court's summary judgment order and what happened when they  
22 took the brand off of it. His testimony and his knowledge did  
23 not exist prior to the summary judgment order and couldn't  
24 have been given in discovery during that period of time.

25 With respect to documents, again, this is the first

1 we're hearing of any request for documents, despite the fact  
2 that we disclosed Mr. Ortiz in January.

3 To clarify with respect to what Magistrate  
4 Judge Swank had ordered, there was a pending motion to compel,  
5 and discovery wasn't closed at the time. That's why this came  
6 up again and she issued a ruling. There was also an agreement  
7 between the parties at that time that witnesses could be  
8 called at trial if they were offered for deposition during  
9 this additional discovery period following a summary judgment  
10 order. We offered Mr. Ortiz and Mr. Deshommes for deposition,  
11 and Variety decided not to take us up on that.

12 THE COURT: Let me take a recess.

13 (Short recess.)

14 THE COURT: All right. I'll hear from the two  
15 witnesses, but the issue of willfulness will not be material.  
16 I've already decided that, and that's not going to be  
17 reopened. To the extent that their testimony attempts to  
18 revisit that, it will be excluded.

19 Go ahead. You can hear from both witnesses.

20 MS. GARKO: Thank you, your Honor. Then we would  
21 call Marvin Deshommes.

22 (Witness sworn.)

23 MS. GARKO: Because he's testifying, we can take the  
24 proffers back that we'd offered previously.

25 May I proceed, your Honor?



1 THE COURT: Yes.

2 MARVIN DESHOMMES, DEFENDANT'S WITNESS, SWORN

3 DIRECT EXAMINATION

4 BY MS. GARKO:

5 Q. Would you please introduce yourself to the Court.

6 A. My name is Marvin Deshommes.

7 Q. Are you currently employed?

8 A. Yes.

9 Q. Where?

10 A. Sam's Club.

11 Q. And what is your title at Sam's Club?

12 A. Vice president, divisional merchandise manager for  
13 seasonal categories.

14 Q. Are Wal-Mart and Sam's Club related at all?

15 A. Sam's Club is a subsidiary of Wal-Mart Stores, Inc.

16 Q. How long have you held your position at Sam's Club?

17 A. Since July 2014.

18 Q. Prior to joining Sam's Club, did you also work at  
19 Wal-Mart?

20 A. I did.

21 Q. What year did you start working at Wal-Mart?

22 A. August 1994.

23 Q. Can you please just briefly summarize the positions that  
24 you held at Wal-Mart since 1994?

25 A. Yes. Buyer trainee for 18 months. Worked in the stores

1 as an assistant manager. Subsequently was trained in  
2 domestics and ladies' wear. Was promoted to a regional for  
3 souvenirs. And from that position took on categories of books  
4 and magazines for a total of five years.

5 I was promoted to senior buyer of toys for six years  
6 and then promoted to senior category director in outdoor  
7 entertaining for seven years before the current position I'm  
8 in.

9 Q. What position did you hold in 2011 and 2012?

10 A. Senior category director for outdoor entertaining,  
11 categories including grilling, patio, pots, wild bird feed,  
12 pots and decor.

13 Q. What were your responsibilities in that position?

14 A. I led the strategy for the merchandise categories, also  
15 leading a team of buyers for the categories that I just  
16 mentioned.

17 Q. And in that role, did you have any responsibility for  
18 private label products within outdoor entertaining?

19 A. Yes.

20 Q. What private label brands, if any, were you responsible  
21 for during your time working in the outdoor entertaining  
22 products category?

23 A. Among others, Backyard Grill.

24 Q. What was your involvement with respect to the Backyard  
25 Grill?

1 A. I would have initiated the request to have the Backyard  
2 Grill brand placed into the particular categories of grilling  
3 at our entry price point.

4 Q. You just referenced the entry price point. Does Wal-Mart  
5 have different price points?

6 A. We do.

7 Q. And what are they?

8 A. We typically have a good/better/best price point scenario  
9 within the category.

10 Q. Can you briefly explain what good/better/best means?

11 A. Yes. At the good level, that would typically be items in  
12 the category that are the lowest price point with the least  
13 amount of features.

14 At the better, it would have slightly better features  
15 included at a mid-tier price point.

16 At the best would be the highest price point with the  
17 most bells and whistles from a feature standpoint, typically  
18 with nationally recognized brands like a Weber or Char-Broil.

19 Q. Why did Wal-Mart want to adopt a private label brand for  
20 grills and grill accessories at the good price point?

21 A. Twofold. One was to reduce the cost that's associated  
22 with our entry price point. So by reducing the cost, we would  
23 have reduced middlemen in that process. We also wanted to  
24 with the different categories declutter the area. So by going  
25 with a particular brand for those particular categories we'd

1 be able to have a more easier shopping experience for the  
2 customer.

3 Q. Why was the clutter at the opening price point?

4 A. We had a lot of items in the various categories. And  
5 looking at the landscape, we thought that there was -- the  
6 communication to the member was done in various ways from  
7 different suppliers and their brands, and we thought we could  
8 take it a more seamless shopping experience with a customer.

9 Q. You also mentioned something along the lines that it would  
10 allow Wal-Mart to secure goods directly from manufacturers.  
11 How would the private label brand allow Wal-Mart to do that?

12 A. Within the private label brand, we would obviously come up  
13 with a look and feel for that particular brand and come up  
14 with its own packaging. We could then go out with an RFP,  
15 request for proposal, with different suppliers, with putting  
16 out our particular specs and have buyers come and bid these  
17 particular items for us. We would select the item, putting  
18 our brand on it, and thus eliminating an agent or broker in  
19 the process, ideally lowering the cost.

20 Q. How, if at all, does that benefit Wal-Mart's customers?

21 A. It follows one of our basic principles of everyday low  
22 cost. So if we can lower the cost of the item, we can lower  
23 the retail. If we lower the retail, we get more consideration  
24 from the customers. If we get more consideration from the  
25 customers, it usually turns into more sales.

1 Q. Were these goals of decluttering the category and being  
2 able to source directly from manufacturers at all dependent on  
3 the particular name that was selected for the private label  
4 brand?

5 A. Not on the name.

6 Q. Was there anything in particular you were looking for in a  
7 name?

8 A. We were looking for the name that fit the categories that  
9 we were talking about within the segment.

10 Q. What do you mean by "fit"?

11 A. We wanted a name that did no harm to the product and  
12 wasn't a deterrent for sales.

13 Q. And based on your experience, do you have an understanding  
14 of what does drive sales in the context of grill and grill  
15 accessories at Wal-Mart?

16 A. Yes.

17 Q. What is your understanding?

18 A. My understanding is that the product itself has to have a  
19 certain amount of qualities and features along with a price  
20 point to go for the particular category.

21 Q. What is that understanding based on?

22 A. Industry data, supplier feedback, consumer feedback on the  
23 particular products.

24 Q. Is it also based on customer research?

25 A. Definitely.

1 Q. Mr. Deshommes, if you could please turn for me in the  
2 binder that you have to Exhibit D56.

3 A. Yes.

4 Q. Do you recognize this document?

5 A. I do.

6 Q. What is that?

7 A. It's a Backyard Grill brand overview dated August 2012.

8 MS. GARKO: Your Honor, we'd offer Exhibit 56.

9 THE COURT: Received.

10 (Defendant's Exhibit 56 received)

11 BY MS. GARKO:

12 Q. Generally, what does this concern?

13 A. It talks about customer research that was done on the  
14 brand -- of launching a private equity brand within our  
15 product categories.

16 Q. If you could please direct your attention to the second  
17 page, which has the Bates number WM01047.

18 A. Okay.

19 Q. I'd like to direct your attention to the top of that page  
20 where it says, "Initial Research Key Learning March 2011."

21 Do you see that?

22 A. I do.

23 Q. What is that referring to?

24 A. Before the product was in the marketplace, we did some  
25 research for the customers from the consumers to get feedback

1 to the brand itself.

2 Q. I'd like to talk about a few of these bullet points that  
3 are listed there. In particular, I'd like you direct your  
4 attention to the second one down.

5 Could you read that second key learning point?

6 A. Names do not have a large impact on shoppers' decisions  
7 when costs, features and benefits are the same. When shopping  
8 based on name alone, shoppers migrate towards well-known,  
9 recognizable names.

10 Q. What does that key learning insight mean?

11 A. It's not the name that's the decision-maker for the  
12 customer in the segment, the decision-maker for a purchase.

13 Q. Thank you.

14 What are the well-known, recognizable brand names  
15 that are referred to at that learning point?

16 A. Weber, Char-Grill would be a couple.

17 Q. Would Backyard have been one of the brands referred to  
18 there?

19 A. Yes.

20 Q. Now, let's look at the third conclusion. Could you read  
21 that one?

22 A. Judging grills by name, shoppers are most likely to choose  
23 well-known brand names.

24 Q. Is that referring back to the two brand names we just  
25 discussed?

1 A. Yes.

2 Q. If you could please look at the fourth conclusion. Could  
3 you please read that?

4 A. If Backyard Grill was the only available brand, shoppers  
5 are more likely to continue shopping than to make a purchase  
6 decision on the spot.

7 Q. What does that key learning insight tell you?

8 A. The name Backyard Grill was not a purchase decision for  
9 the customer.

10 Q. Now, was there an overall take-away from Wal-Mart from  
11 this research that was conducted?

12 A. Once again, it was that the name Backyard Grill was not  
13 the driving decision on the customer making a decision to  
14 purchase for the category.

15 Q. Now, if you look to the lower portion, there's a section  
16 there called "Follow-Up Research, January 2012."

17 Do you see that?

18 A. I do.

19 Q. What does that refer to?

20 A. As the product was now in the marketplace, we wanted to  
21 have feedback on the consumer to understand how the product  
22 was resonating with them.

23 Q. And what did that post-marketplace entry research show?

24 A. It pretty much followed that the product itself was -- the  
25 brand itself was not the driving force for the customer.



1 Q. Now, let's focus on the first bullet point there. Can you  
2 please read that one?

3 A. Open-ended responses. Questions were asked of respondents  
4 to better understand the customer view and awareness of  
5 brands. Unaided, a large majority of respondents cannot name  
6 the brand they currently owned, only the retailer where  
7 purchased.

8 Q. What, if anything, does the fact that a majority of  
9 respondents were not able to name the brand of the grill they  
10 currently owned tell you, if anything?

11 A. The brand name wasn't an important portion of their  
12 decision-making on purchase.

13 Q. How does it tell you that?

14 A. In my opinion, if you're going to buy a grill and you  
15 don't remember the name brand of the grill, a grill that's  
16 going to last three-plus years in your house, that brand is  
17 not the decision-maker for you.

18 Q. Now, was the creation of a private label brand at Wal-Mart  
19 just limited to the selection of the name?

20 A. No.

21 Q. What else goes into it?

22 A. The packaging that you use, the color and the fonts that  
23 you would use to describe the items.

24 Q. How do you determine what goes on and how those items  
25 should be configured in the packaging?

1 A. We would look at what we're currently doing in the  
2 marketplace and our shelves, and we'd also look at the  
3 competitive landscape to understand how they're communicating  
4 to the customer in that particular segment.

5 Q. Why would you want to look at the competitive landscape?

6 A. Our major competitors are out there. They're  
7 communicating to the customer. So we want to get learnings on  
8 how they're doing it and what's different from what we're  
9 doing to understand how we can better the scenario.

10 Q. I'd like you to please turn to the exhibit that's been  
11 marked D53 in your binder.

12 A. Okay.

13 Q. Do you recognize that document?

14 A. I do.

15 Q. What is that?

16 A. It's a Backyard Grill competitive marketplace photo dated  
17 March 14, 2011.

18 MS. GARKO: Your Honor, we would move D53 into  
19 evidence.

20 THE COURT: Received.

21 (Defendant's Exhibit 53 received)

22 BY MS. GARKO:

23 Q. What is this presentation about?

24 A. It looks at the categories in grilling and it's  
25 photographs of the different planograms in the marketplace.

1 Q. Why was this presentation created?

2 A. Once again, for us to understand what the competitive  
3 landscape looked like for the grilling segment.

4 Q. What do these marketplace photos reveal, if anything?

5 A. They reveal similar use of colors being red, black, gray,  
6 as some of the main cover tones, a lot of different items in  
7 the segment with different packaging sizes in the categories  
8 across the board.

9 Q. Now, could you please turn to the third page of that  
10 document which has the Bates No. WM00863.

11 A. Yes.

12 Q. This is entitled "Presentation Overview"; is that right?

13 A. Yes.

14 Q. And you see there's a series of bullet points. Could you  
15 please read the last bullet point.

16 A. "Clearly communicating the features is important to  
17 selling to the predominantly male buyer. Men don't typically  
18 buy benefits the way women do. Men know what they want and  
19 buy the feature, so clear and exact communication of the facts  
20 is key. This is reflected almost universally in these  
21 examples."

22 Q. What does this mean, if anything, for Wal-Mart in  
23 designing a private label brand for grills and grilling  
24 accessories?

25 A. One, allow the item be the hero and call up the features

1 in a very factual way.

2 Q. "Let the item be the hero," what do you mean by that?

3 A. So on the planogram itself, we wanted to make sure if we  
4 were going to have a grill cover, that grill cover was  
5 prominently featured on the packaging itself. Or if it was a  
6 grill, we wanted to make sure we called out whether it's the  
7 burger count and other things that are very factual for men  
8 and allow that to be the prominent components for the male  
9 member to make a decision when purchasing.

10 Q. You said this contains photos of the competitive  
11 landscape. Is Variety included in this document?

12 A. It's not.

13 Q. Why not?

14 A. From our research and feedback, whether it's through the  
15 supplier's input, looking at industry data who ran the sales,  
16 Variety was never brought up to the attention as a supplier in  
17 this particular category.

18 Q. Could you please turn to the exhibit in your binder marked  
19 D54.

20 A. Okay.

21 Q. Do you recognize this document?

22 A. I do.

23 Q. And what is it?

24 A. It's "Backyard Grill Initial Thoughts on Creative," dated  
25 March 21, 2011.

1 MS. GARKO: Your Honor, we offer D 54 into evidence.

2 THE COURT: It will be received.

3 (Defendant's Exhibit 54 received)

4 BY MS. GARKO:

5 Q. Will you please tell me generally what this is about?

6 A. It looks at different packaging options for the Backyard  
7 Grill brand.

8 Q. Now, if you could please turn to the third page on that  
9 document, which has Bates No. WM00901. Do you have that page?

10 A. I do.

11 Q. Do you see it says, "Steps to Purchase 1-2-3"?

12 A. Yes.

13 Q. Can you explain what that is?

14 A. From our research, it would say what are the different  
15 steps that are the decision-making options for the customer to  
16 make a decision in this category.

17 Q. I'd like to focus your attention on Step 2. Could you  
18 please read what's reported there?

19 A. "Step 2: Men buy features, women buy benefits. To sell a  
20 grill to a man, we need to deliver the technical specs in a  
21 clear, concise way with a minimum of reading. Men want to  
22 know something is 900 megahertz; women want to know how those  
23 900 megahertz will help them more than 800 megahertz. In many  
24 easier, males are an easier sell, particularly if your product  
25 will outperform other products. With the ladies, we have a

1 lot more explaining to do."

2 Q. So what does that step mean?

3 A. Essentially, it calls out for a male-dominated category.

4 It's calling out the features as the prominent thing and  
5 making sure that we call on the key attributes to the member.

6 Q. And if you could please look at Step 3. What does Step 3  
7 say?

8 A. "Step 3. A majority of manufacturers in this category are  
9 using very similar color pallets in photography. This is an  
10 excellent opportunity for Wal-Mart, since a very effective way  
11 to catch attention is to do things a little different so  
12 attention is captured. Once you have their eye, deliver those  
13 text specs and it's your one-two punch that will get this  
14 product to the cash register."

15 Q. What does that tell you in terms of designing the grill  
16 and grilling accessories packaging, if anything?

17 A. It talks about taking the color pallet, bolding it out,  
18 making it slightly different for the marketplace so we can  
19 capture the attention of the member.

20 Q. Did the design of the Wal-Mart grill and grill accessories  
21 product packaging that Wal-Mart ended up using for Backyard  
22 and design brand take into account these thoughts on creative  
23 what drives customer purchases?

24 A. Yes.

25 Q. How did it do that?

1 A. We took the various categories that were there, and we  
2 made sure that they followed a similar visual look from a  
3 color standpoint. We also would have stated that the items --  
4 the item description would have been the hero in that  
5 particular packaging, so we could have called out once again  
6 grill cover in the bigger font. Backyard Grill would have  
7 been in the background on the left-hand side, for the most  
8 part. But certainly the hero of the item was the item itself,  
9 and that we would have called out the attributes on the side  
10 of the item.

11 Q. Why not have Backyard Grill in the design name stand out?

12 A. With the several hundred items we had in this particular  
13 segment, we wanted to make sure that the member was able to  
14 find the item, and we would have had to see a Backyard Grill,  
15 and it would have been hard for the customer to find the  
16 actual item that they wanted.

17 So it was important for us they didn't see a Backyard  
18 Grill, but they saw where wanted their grill cover, where they  
19 wanted their spatula or where they wanted their actual grill  
20 was the most important thing for us.

21 Q. Was it Wal-Mart's intention to have the Backyard Grill and  
22 design name drive sales of the product?

23 A. The main purpose for us to have the Backyard Grill was,  
24 once again, to lower the cost of the goods. By lowering the  
25 cost, we would then lower the retail, plus declutter the space

1    itself for making it an easier shopping experience for the  
2    customer. Those two components would have helped drive more  
3    sales.

4    Q. Then did it matter what the particular name was that was  
5    used?

6    A. It did not.

7    Q. Now, Mr. Deshommes, I apologize. You used the word  
8    "member" a couple of times. What are you referring to there?

9    A. The customer. It's an internal term from Sam's Club. So  
10   it's the customer at Wal-Mart.

11   Q. When did Wal-Mart start selling good bearing the Backyard  
12   Grill and design brand?

13   A. October/November time frame 2011.

14   Q. Do you know what Wal-Mart's sales were for the lower price  
15   point grills and grilling accessories in 2009?

16   A. Approximately \$175 million.

17   Q. And do you know what Wal-Mart sales of grills and grilling  
18   accessories were at the lower price point category in 2010?

19   A. Approximately \$188 million.

20   Q. Were those products that Wal-Mart was selling at the lower  
21   price point category in 2009 and 2010 transitioned to the  
22   Backyard Grill and design brand?

23   A. Yes.

24               MS. GARKO: I have no further questions.

25               THE COURT: Any cross?



1 MR. ADAMS: Just a few, your Honor.

2 Would you give Mr. Deshommes your exhibit book that  
3 has 33?

4 CROSS-EXAMINATION

5 BY MR. ADAMS:

6 Q. You know Ms. Karen Dineen; do you not?

7 A. I do.

8 Q. Have you read her deposition in this case?

9 A. I have not.

10 Q. You realize her deposition was taken, though, don't you?

11 A. Yes.

12 Q. Page 26, line 6 of her deposition.

13 In pertinent part, her answer regarding processes  
14 they were going through said: "So how the process went,  
15 Eric brainstormed on names that would resonate with the  
16 customer in these categories."

17 Isn't it true that you were looking for trademarks  
18 that would resonate with customers in these categories?

19 MS. GARKO: Objection, your Honor, based on him  
20 reading from Ms. Dineen's testimony.

21 THE COURT: I didn't hear you.

22 MS. GARKO: I said objection, your Honor, based on  
23 him reading from Ms. Dineen's testimony and essentially  
24 testifying on her behalf.

25 MR. ADAMS: Your Honor, I'm impeaching this witness

1 with the deposition testimony of one of his coworkers.

2 THE COURT: Overruled. You're talking to him instead  
3 of to me, that's why I couldn't hear you.

4 MS. GARKO: I apologize, your Honor.

5 THE COURT: That's just not good advocacy. Don't  
6 look at him and say it, look at me.

7 THE WITNESS: Can you repeat the question?

8 BY MR. ADAMS:

9 Q. Yes.

10 Ms. Dineen testified at her deposition: "So how the  
11 process went, Eric brainstormed on names that would resonate  
12 with the customer in these categories?"

13 Isn't it true that you were looking for trademarks  
14 that would resonate with customers? Wasn't Ms. Dineen telling  
15 the truth when she gave me that answer?

16 A. We were looking for names that would fit for the category.

17 Q. And what do you interpret the word "resonate" to mean,  
18 then? Do you understand what Ms. Dineen was saying?

19 A. Fit the category.

20 Q. And anything else?

21 A. Not to my knowledge, no.

22 Q. Okay.

23 MR. ADAMS: Does he have the exhibit book.

24 May I approach the witness, your Honor?

25 THE COURT: Sure.

1 BY MR. ADAMS:

2 Q. Mr. Deshommès, take a look at document at Tab 33 which I  
3 just handed you. Do you see that?

4 A. I do.

5 Q. All right. And, Mr. Deshommès, let me direct your  
6 attention to the email that's down near the bottom. Who is  
7 Eric Morea?

8 A. Eric worked on the brand team at Wal-Mart.

9 Q. Okay. And this is an email from Eric Morea to you; is  
10 that right?

11 A. It is.

12 Q. And so it's a very brief email, particularly since most of  
13 it's been redacted.

14 Would you mind reading this email for the record,  
15 please?

16 A. "Marvin, as discussed, please see attached summary of the  
17 inputs from legal and customer insights on potential names for  
18 grills and grill accessories. Based on name availability and  
19 customer preference, the leading name is The Backyard  
20 Barbecue. This is the name I'm recommending based on the work  
21 done so far."

22 Q. Then there's some redactions, correct?

23 A. There's redactions yes.

24 Q. What does the last sentence say?

25 A. "We'll have a backup name in case the name Backyard BBW

1 [sic] is not available."

2 Q. Go up to the earlier paragraph. "Based on name  
3 availability and customer preference," how did Wal-Mart  
4 determine that Backyard Barbecue was the leading name in terms  
5 of customer preference?

6 MS. GARKO: Objection, beyond the scope.

7 THE COURT: Overruled.

8 BY MR. ADAMS:

9 Q. I'm referring to the sentence that says, "based on name  
10 availability and customer preference the leading name is  
11 Backyard Barbecue."

12 How did Wal-Mart go about determining based on  
13 availability and customer preference, Backyard Barbecue was  
14 the leading trademark?

15 MS. GARKO: I object to the extent he's asking for  
16 information that would be subject to attorney-client  
17 privilege, and I caution the witness not to reveal any of that  
18 information.

19 MR. ADAMS: We're not looking for any attorney-client  
20 privilege information.

21 THE COURT: Overruled.

22 BY MR. ADAMS:

23 Q. Mr. Deshombres, I want to know the answer to this question.

24 A. How was the name Backyard Barbecue selected?

25 Q. How did Wal-Mart determine that it was the leading name

1 based on customer preference? Forget out availability. How  
2 did Wal-Mart determine, based on what Mr. Morea said to you,  
3 that Backyard Barbecue was the leading name in terms of  
4 customer preference? How did it determine that?

5 A. I don't know the specifics on how he would have determined  
6 it.

7 Q. When you saw that, did you call Mr. Morea up and say,  
8 "What are the specifics on how you determined that Backyard  
9 Barbecue was the leading name in customer preference"?

10 A. There would have been -- they would have been come to me  
11 with basically here's a list of names. They would have gone  
12 through some type of filter with Luci study and legal releases  
13 to come up with what the name recommendations are.

14 Q. Would you look at No. 44, Mr. Deshommes.

15 This is from Mr. Morea again; is that right?

16 A. Yes.

17 Q. And it's addressed to you.

18 And who is Joe DeLeo?

19 A. Joe DeLeo was the previous buyer for the grilling  
20 category.

21 Q. And then there's some redacted material, quite a bit. But  
22 then it says, "The only name available is Backyard Grill. In  
23 general, I feel good about this name. I am now reaching out  
24 to our customer insights team to understand how to test and  
25 validate this name from a customer preference."

1                   How did Wal-Mart go about testing this name for  
2 customer preference? And why is it that it ended up choosing  
3 Backyard Barbecue?

4                   MS. GARKO: Objection, compound.

5                   THE COURT: Overruled.

6 BY THE WITNESS:

7 A. We didn't choose Backyard Barbecue. We chose Backyard  
8 Grill.

9 BY MR. ADAMS:

10 Q. Fair point. Backyard Grill.

11 A. The question is how did we go about choosing Backyard  
12 Grill?

13 Q. How was it validated? How was it tested and validated?

14 A. "I should have an update from customer insights soon. I  
15 will share that with you once I have more details."

16 Q. What happened?

17 A. I've also. . .

18                   Backyard Grill was selected.

19 Q. Now, if you would look at No. 45, Mr. Deshommes, who is  
20 Deanna Baker?

21 A. Deanna Baker at that time was the vice president,  
22 divisional merchandise manager for outdoor living.

23 Q. And this is an email she sent to you, correct?

24 A. (No response.)

25 Q. I'm looking down towards the bottom.

1 A. Yes.

2 Q. Figure 23. Could you read that very short email for the  
3 record, please?

4 A. From Deanna to me?

5 Q. Where it says, "Marvin, based on the study. . ."

6 A. "Marvin, based on the study, Backyard Barbecue is really  
7 the only option to us. I think the informality of the name  
8 actually fits our customer and price point positioning well.  
9 As long as we believe it will work for private label charcoal,  
10 I am on board. Thanks, Deanna."

11 Q. So isn't it true that shortly thereafter Wal-Mart made the  
12 decision to use Backyard Grill? Did it not?

13 A. We did make the decision to use Backyard Grill.

14 Q. Isn't it true that you, first of all, made the decision to  
15 use it because it resonated with the customers, as Ms. Dineen  
16 had testified, correct?

17 A. We used Backyard Grill because we believed it fit with the  
18 category.

19 Q. What do you mean "it fit with the category"?

20 A. We wanted the name not to do harm, meaning we wanted to  
21 make sure that the customer was willing to purchase it with  
22 the name Backyard Grill on the product.

23 MR. ADAMS: Your Honor, we would offer Exhibits 33,  
24 44, and 45 into evidence at this time.

25 THE COURT: All right. They're received.

1 (Defendant's Exhibit 33, 44, and 45 received.)

2 MR. ADAMS: May I approach, your Honor?

3 THE COURT: Yes.

4 BY MR. ADAMS:

5 Q. Turn to Exhibit 14, Mr. Deshommnes. I think we'll try to  
6 save you some time here.

7 Mr. Deshommnes, are you familiar with what's called a  
8 Luci study?

9 A. Vaguely, yes.

10 Q. And what is a Luci study?

11 A. It was a study that our brand team or other team that had  
12 access to that would poll or survey people about different  
13 questions on a particular topic.

14 Q. Were you involved at all in either planning or reviewing  
15 or analyzing the Luci study taken in this case when the  
16 Backyard trademark was selected?

17 A. I was involved in seeing the -- starting up with what the  
18 timeline would be. I would be involved in looking at the  
19 summaries of surveys.

20 Q. Okay. And isn't it true that Backyard performed well in  
21 the Luci studies carried out in this analysis? Isn't that  
22 correct?

23 A. We would have used Backyard Grill or other names. I don't  
24 remember Backyard just being the only name that was selected.

25 Q. Backyard was the subject of a Luci study; was it not?



1 A. Once again, I would have seen overviews of studies, and I  
2 would have talked to the brand team and they would have given  
3 me a summary of it. I didn't actually conduct the actual  
4 study.

5 Q. Did you ever review the Luci studies?

6 A. Usually, we would have a meeting periodically that would  
7 go over the summary of it. The teams would have done the  
8 particulars of looking at the particular questions that they  
9 would have had asked.

10 Q. Would Ms. Dineen be more familiar with the results of the  
11 Luci surveys than you?

12 A. Yes.

13 MR. ADAMS: Okay. Your Honor, we'll reserve these  
14 questions if and when Ms. Dineen testifies. I have no further  
15 questions for this witness.

16 THE COURT: Is that all for this witness?

17 MS. GARKO: Yes, your Honor.

18 THE COURT: Thank you. You may step down.

19 (Witness excused.)

20 THE COURT: Call your next witness. You have  
21 Mr. Ortiz.

22 (Witness sworn.)  
23  
24  
25

1                   DAVID ORTIZ, DEFENDANT'S WITNESS, SWORN

2                   DIRECT EXAMINATION

3 BY MS. GARKO:

4 Q. Would you please introduce yourself to the Court.

5 A. Yes. My name is David Ortiz.

6 Q. Are you currently employed?

7 A. I am.

8 Q. Where do you work?

9 A. Wal-Mart Stores, Inc.

10 Q. What is your position at Wal-Mart?

11 A. I am the vice president divisional merchandise manager for  
12 outdoor living.

13 Q. And in your present position as outdoor living, what  
14 product categories, if any, do you oversee?

15 A. I oversee all the categories within outdoor living.

16 Q. And does that include grills and grill accessories?

17 A. Yes, it does. Grills, grill accessories, patio furniture,  
18 birding and approximately another 20 categories.

19 Q. And are you familiar with Wal-Mart's Backyard Grill and  
20 design brand?

21 A. I am.

22 Q. What products does that cover?

23 A. Grills and grill accessories.

24 Q. And what responsibilities, if any, do you have with  
25 respect to those products?

1 A. When I took the role in July of 2014, my responsibility  
2 was for all the merchandise, that was under the umbrella of  
3 outdoor living, as well as most recently my responsibility was  
4 transitioning out of the Backyard Grill brand.

5 Q. Back me up just for a minute.

6 Generally, what are your responsibilities in your  
7 position as the divisional merchandise manager for outdoor  
8 living?

9 A. My responsibility is to make sure that we have assortments  
10 that our customers want.

11 Q. And how long have you held that position?

12 A. Two-and-a-half years.

13 Q. How long have you been at Wal-Mart more generally?

14 A. A long time. 33 years in total.

15 Q. So you've held other positions at Wal-Mart then?

16 A. I have.

17 Q. Could you please briefly give an overview of what those  
18 positions were.

19 A. While in school, I was very blessed to have a job at  
20 Wal-Mart putting bicycles and tricycles together in the back  
21 room. I was able to get onto the floor, sales floor. That  
22 was a big deal.

23 And then after college, I went to work for Wal-Mart  
24 in operations, worked in the operations division for  
25 approximately three years. Came to the home office. When I

1 was in the home office, I've held numerous roles: Ladies'  
2 wear buyer, mens' wear buyer, stationery buyer, electronics,  
3 toys, optical division. I've also been in the sourcing  
4 division three different times in my career. And then prior  
5 to this role, I was the divisional merchandise manager for  
6 housewares.

7 Q. Based on that experience, can you describe who Wal-Mart's  
8 customers are?

9 A. Yes, ma'am.

10 Q. Who are they?

11 A. Pretty much everybody. We serve a lot of people each and  
12 every day, high-income, low-income, highly educated, not  
13 educated. We have a broad range of customers and we feel like  
14 we serve everybody.

15 Q. How, if at all, is that reflected in the products that  
16 Wal-Mart offers?

17 A. Well, that dictates that we have an assortment that  
18 appeals to everyone, you know, people that want value and  
19 people that want brand names where we have them.

20 Q. Now, you heard Mr. Deshommes talk a little bit about the  
21 good, better, best categories?

22 A. Yes.

23 Q. Is that your understanding as well, that Wal-Mart uses  
24 those categories for different tiers of pricing?

25 A. That's correct.

1           We -- when we build merchandise assortments, as  
2 Mr. Deshommes referred to as planograms, when we build those  
3 planograms, we actually have good, better and best within  
4 those planograms.

5 Q. Now, for the "good" category, based on your experience  
6 what, if anything, do you understand drives sales in that  
7 category at Wal-Mart?

8 A. Well, we know our customer loves value at Wal-Mart.  
9 Whether you're high income or low income, but they love value.

10           And a "good" business or "good" category, typically  
11 that's value-oriented, low retail with qualities and features.

12 Q. Now, you testified in your current position you've  
13 overseen Wal-Mart's transition away from products with  
14 Backyard Grill and design name; is that correct?

15 A. That's correct.

16 Q. And when did Wal-Mart begin transitioning away from that  
17 name?

18 A. In January of 2016.

19 Q. And what did that first entail?

20 A. Well, after the holidays we were able to pull everybody  
21 together. I called a huddle with everyone that I could think  
22 of functionally and huddled people together.

23 Q. Who was involved in that meeting?

24 A. We had merchants, we had product development, we had  
25 brands, we had technical, we had sourcing. Maybe I mentioned

1 merchants as well. But quite a few people. Quite a few  
2 functional teams.

3 Q. What was the purpose of that meeting?

4 A. Well, first of all, I wanted to, kind of update the team  
5 on what was going on and what we were dealing with. But I  
6 also wanted to know where stuff was, right? So the pipeline,  
7 I wanted to understand the pipeline. What was in  
8 manufacturing, what was on the water, what was in our import  
9 distribution centers, what in the stores, et cetera, to gain a  
10 quick assessment of where we had product at.

11 Q. In addition to assessing where you had product, was there  
12 anything else that Wal-Mart looked at respect to its Backyard  
13 Grill and design branded products?

14 A. Yes, we did.

15 Q. What else did you look at?

16 A. We also -- after that meeting, the team came together and  
17 we pulled together literally everything that was out there,  
18 the hundreds of products that we had, the items. We pulled  
19 products from the warehouse. We pulled product from the  
20 stores. We had pulled product from what we had in the layout  
21 center which is a mock store. And we literally laid out every  
22 single product.

23 It was probably 80 linear feet of just master  
24 cartons, inner cartons, packaging so that we could assess  
25 where all the name -- the name was on packaging and external

1 cartons, internal cartons. So we had our teams walk through  
2 that to understand how vast this was so that we could get our  
3 -- you know, get our arms around it.

4 Q. And were you able to get your arms around it?

5 A. Yes, we were.

6 Q. And was there a decision made about what to do with the  
7 product that had Backyard Grill and design brand on them?

8 A. Yes. So in early February, we made that decision.

9 Fortunately, we had people overseas. We had merchants  
10 overseas as well as sourcing overseas, and we were able to  
11 work with those teams quickly to move up in the pipeline so  
12 that we could adjust and change any packaging, any badges that  
13 were on grills, any hangtags, anything that we could get our  
14 hands on quickly up in the manufacturing process.

15 So we were able to start that process, because we  
16 identified -- what we really needed to do through those  
17 assessments was just literally take the name off to be  
18 compliant.

19 Q. And why was the decision made simply just to remove the  
20 name?

21 A. Well, we didn't want to change packaging, we didn't want  
22 to change the font, because that was part of what this  
23 discussion was, how to make this simple and how do we make it  
24 seamless for our customers and for our stores. When you're  
25 dealing with over 4,000 stores, you try to make things as

1 simple as possible. And anything else would have probably  
2 made it more complicated. So the simplest and most seamless  
3 way to do this was to take the name off.

4 Q. And was the decision to take the name off implemented?

5 A. It was.

6 Q. How?

7 A. Well, that's when -- that's when a lot of the work  
8 started. Like I said, back upstream we started to work with  
9 the teams overseas to take the product name off the grills,  
10 take it off the external packaging, any pamphlets, any  
11 warranties, anything that had it on there.

12 Like I said, we laid it all out. So we started the  
13 process very quickly in order to do that.

14 Q. Was there anything else aside from looking at the  
15 packaging and the manufacturing aspects that Wal-Mart had to  
16 do to transition the brand over?

17 A. Yes, ma'am, there was.

18 Q. What was that?

19 A. So that's the production side of that.

20 We also had to address the administrative side. So  
21 the administrative side was to be able to still track the UPC  
22 code, which we talked about earlier, was the universal product  
23 code. That's unique to a product. So we had the product  
24 that's in reference. And then we also had the product that  
25 was the new product, the new product which we referred to



1 sometimes as "no name." So we had to be able to comply so we  
2 could continue to report sales and all the other things that  
3 we needed to do on the Backyard product. But we also had to  
4 make sure that seamlessly for the stores and our customers, it  
5 was seamless to them. They didn't know any different. This  
6 item came in and went exactly on the same pick hook, it went  
7 exactly on the same shelf as everything else. So that  
8 behind-the-scenes administratively had to be done and that was  
9 quite -- there was a lot of gymnastics behind the scenes.

10 Q. Were there costs associated with the branding transition?

11 A. Yes.

12 Q. Were there costs at the corporate level?

13 A. There were.

14 Q. What were those costs?

15 A. I don't have a dollar amount for that. But I know that  
16 there was a diversion of resources. Clearly, I mean, when you  
17 have something of this magnitude, people have to stop what  
18 they're doing and do extra work, do other things above and  
19 beyond their day job.

20 Some of the things that I mentioned, people had to  
21 redesign packaging, get new data files out to our suppliers  
22 quickly so that we could try to have less disruption within  
23 the pipeline. There were a lot of things that were being done  
24 behind the scenes that would have been what I would have  
25 diversion of resources or people not doing their day job.

1 Q. Were there any costs to the stores or customer level?

2 A. Yes.

3 Q. What were the costs?

4 A. One of them which is measurable is just being out of  
5 stock. So when we weren't shipping products to our stores to  
6 backfill our sales, with that, we had out-of-stocks. When you  
7 have out-of-stocks, then you have unhappy stores and you have  
8 unhappy customers. So that's not a good thing. That, to me,  
9 from a merchant perspective is all about trust, trust with the  
10 customers and trust with the stores.

11 So if we don't have product on the counter, we can't  
12 sell it to the customer who comes in looking for it. And then  
13 our stores spend a disproportionate amount of time trying to  
14 research why don't I have this product. So they call or email  
15 or whatever trying to find this. So that would be a cost as  
16 well. You can't put a number on that, but it would definitely  
17 with 4,000-plus stores be a sizeable number.

18 Q. Were there any monetary costs to Wal-Mart as a result of  
19 the transition?

20 A. Yes, ma'am, there were.

21 MR. ADAMS: Objection, your Honor. I don't know  
22 where this is going, but it's relevant. Cost to Wal-Mart as a  
23 result of taking the product off the shelf is not an issue in  
24 this case.

25 MS. GARKO: Your Honor, this goes to the Synergistic

1 factors with respect to undue delay because if you allow the  
2 line of questioning, in two questions I will get to the fact  
3 of how that cost might have been different if this were done  
4 earlier.

5 THE COURT: Say that again. Speak a little slower.

6 MS. GARKO: I'm sorry.

7 With respect to the Synergistic factors, one of them  
8 to be considered is whether there was undue delay by Variety  
9 and whether that caused any additional costs to be felt by  
10 Wal-Mart.

11 If you allow me just a couple more questions, this  
12 will get to whether the costs would have been different had  
13 Variety asserted its rights sooner.

14 THE COURT: So this is a laches argument?

15 MS. GARKO: It is a Synergistic factor argument.

16 THE COURT: All right.

17 BY MS. GARKO:

18 Q. I believe the question, Mr. Ortiz, was, were there any  
19 monetary costs to Wal-Mart as a result of the transition?

20 A. Yes.

21 As I mentioned, when we moved upstream, we obviously  
22 had to have manufacturers that destroyed badges, molds in some  
23 cases, tags, labels, pamphlets, things like that. So we  
24 either incurred that cost ourself or the vendor helped us  
25 manage through that cost as well. But there was a cost of

1 making that -- those changes.

2 Q. Now, you testified that this took place at the beginning  
3 of 2016. Based on your experience with Wal-Mart, would the  
4 costs and expense to Wal-Mart have been any different had the  
5 Backyard Grill and design products been transitioned in July  
6 of 2012?

7 A. I believe so.

8 Q. How so?

9 A. In 2010 we would have had significantly less SKUs. We  
10 would have had significantly less inventory because of having  
11 less SKUs. And we also had just literally less stores.

12 Q. Now, how would it have compared if you removed the  
13 Backyard Grill and design name in April of 2014 versus July of  
14 2012?

15 A. Similarly. There would have still been less SKUs than  
16 there would be today. There would be less inventory than  
17 there is today. And we would have also had less stores. So I  
18 think the number is approximately today we have 20 percent  
19 more stores than we had in 2012.

20 THE COURT: But that argument is like saying to  
21 somebody who's embezzling at the bank, you know, if you'd been  
22 caught earlier, you wouldn't have taken as much. It really  
23 doesn't -- it rings hollow that if you'd stopped infringing  
24 earlier, you wouldn't have had as much loss, no?

25 Anyway. Go ahead. Finish your next question.

1 BY MS. GARKO:

2 Q. Just to clarify one thing. You've referenced a SKU a  
3 couple of times. What is that?

4 A. Stock keeping unit. An item.

5 Q. Now, you said that the decision was made to remove the  
6 Backyard Grill and design name. How does the packaging of the  
7 products compare between when it had the Backyard Grill and  
8 design name on it and when you took it off?

9 A. The packaging's identical. It's as if you would just take  
10 a piece of black tape and put it over the name or if you took  
11 a black marker and covered it up. It looks identical.

12 Q. Mr. Ortiz, I'd like to direct you to the binder you have  
13 in front of you which has Exhibits 220, 221, 222 and 223 in  
14 it. Could identify what those exhibits -- what those exhibits  
15 are?

16 A. Yes. The first one is a picture of a stainless steel  
17 large bar burner.

18 Q. And that's Exhibit 220.

19 What is Exhibit 221?

20 A. Is a grill cooker.

21 Q. And what about Exhibit 222?

22 A. Is a double brush.

23 Q. And lastly what about Exhibit 223?

24 A. It's an actual box, an outer box of a gas grill.

25 Q. Do these photos that are depicted at Exhibits 220 through

1 223 accurately depict how the Backyard Grill and design name  
2 appeared on products before the name was removed?

3 A. That would be correct.

4 MS. GARKO: Your Honor, we offer Defendant's Exhibits  
5 220, 221, 222 and 223.

6 THE COURT: They're received.

7 (Defendant's Exhibits 220-223 received.)

8 BY MS. GARKO:

9 Q. With respect to these product pictures here, how would  
10 they look with the brand name removed?

11 A. As I referenced earlier, they would be identical. And  
12 basically the name -- the easiest thing that we did was  
13 extract the name off of that and just kept the color and the  
14 font and the look.

15 Q. Did Wal-Mart ever reference Variety or Rose's on its  
16 Backyard Grill and design branded product?

17 A. No.

18 Q. Did Wal-Mart ever just use Backyard alone on its Backyard  
19 Grill and design branded product?

20 A. Not to my knowledge.

21 Q. Did Wal-Mart ever use Backyard Barbecue on Backyard Grill  
22 and design branded products?

23 A. No.

24 Q. Now, could you just explain briefly why the branding was  
25 transitioned in this way to just simply remove the name?

1 A. It's a simple thing, right? We try to -- when we deal  
2 with that many stores, we try to keep things simple and keep  
3 it seamless. Again, our customers who value what we do and  
4 helping them shop and make it easier for them, making no  
5 changes to the packaging from a color perspective when we made  
6 the changes just really helped us do that.

7           You know, in a private brand world a name helps from  
8 an organizational principle, but also there's color involved,  
9 there's fonts involved, there's features involved, those kind  
10 of things. That's where we leaned into that taking the name  
11 off, staying focused on the attributes and the color for  
12 customer to make it simple for them and make it for our  
13 associates very simple and seamless was the way to go.

14 Q. Was there overlap between the products with the name and  
15 without the name on the shelves?

16 A. Yes.

17 Q. Would there be instances where those products were next to  
18 each other?

19 A. Yes.

20 Q. Now, did you do anything to monitor the transition away  
21 from the Backyard Grill and design name?

22 A. I did.

23 Q. What did you do?

24 A. Well, I delegated it to my merchant to do that. And so  
25 Matt Kovach actually oversaw that. But he kept me apprised of

1 major decisions, things that need to be made, whenever I need  
2 to be pulled into decisions to be made. UPC was one of those  
3 decisions on how to do that working with the team. So he kept  
4 me apprised of the situation.

5 Q. And were there any issues reported to you about the  
6 transition?

7 A. The transition of the packaging, no.

8 Q. If there had been issues or concerns or questions or  
9 feedback about the removal of Backyard Grill and design name,  
10 would you have expected to hear about them?

11 A. Oh, yes.

12 Q. Why do you say that?

13 A. Wal-Mart, even though we have a lot of stores, we're still  
14 a very small company. By that I mean, I would have heard it  
15 through emails, I would have heard it through phone calls. We  
16 have officers' meetings every Friday. I have great  
17 relationships with the operators. I literally get emails  
18 every single day from either department managers, shift  
19 managers, store managers, market managers sometimes for the  
20 simplest things like why am I out of stock on something or why  
21 did you send me a pallet of mulch. So it's that small of a  
22 company as it relates to communications. So I would have  
23 heard about it.

24 Q. And you didn't hear anything?

25 A. No, I did not.



1 Q. And did you hear anything from the team that reports to  
2 you at a corporate level about any issues with the rebranding?

3 A. I did not.

4 Q. And would you have expected to report issues -- them to  
5 report issues to you if they had heard them?

6 A. I would. Something of this magnitude and this big, I  
7 definitely would have. Matt knew that I wanted to be apprised  
8 of things along the way if there were challenges or problems  
9 for the stores. And Matt and other people in our organization  
10 have the same kind of access. I mean, we send our numbers,  
11 our phone numbers out to our stores. Scary, but we do. And  
12 they take advantage of it.

13 Q. Now, did the fact that you never heard any complaints,  
14 concerns, questions or other feedback about the removal of the  
15 Backyard Grill and design name tell you anything?

16 A. That tells us -- that tells me that what we tried to do  
17 worked. What we -- we accomplished what we wanted to, make it  
18 seamless for the stores. They didn't know it was happening  
19 and the customers as well didn't notice.

20 Q. Was it surprising to you that it didn't cause any issues?

21 A. It actually wasn't. Again, it speaks to the private  
22 brand. With all due respect to the private brand team, when  
23 you're developing a private brand at a good level, it's  
24 usually about value and usually about the attributes, not so  
25 much the name.

1 Q. Now, Mr. Ortiz, if it's the case that the name didn't  
2 particularly matter and it was more about an organizing  
3 principle as you said earlier, why didn't Wal-Mart just stop  
4 using the name when Variety complained?

5 A. Well, as I just explained, it's a very complex thing.  
6 Even when we started this process in January, the amount of  
7 work that had to be done, so the complexity of this is very  
8 complex, a lot of SKUs. It can be expensive, right, to not  
9 only the organization but also for customers from the  
10 standpoint of not having product on the shelf. It can be  
11 disruptive to the business just in total. It can be  
12 disruptive for our supply base as well along the way.

13 Taking all those factors into account and then again  
14 with my years of experience, I've had a lot of experience, and  
15 then not being directed at that point in time prior to that to  
16 remove that -- to remove the product, we stayed the course.

17 THE COURT: But there was a point in time, from what  
18 I've heard, in which the product had a different name that was  
19 not -- that was a trademark. It started with an M, I think.  
20 What was it called?

21 MS. GARKO: Are you referring to mainstay, your  
22 Honor?

23 THE COURT: What's the name.

24 MS. GARKO: Are you referring to mainstay?

25 THE COURT: Main?

1 MS. GARKO: Stay.

2 THE COURT: Stay? S-T-A-Y?

3 MS. GARKO: That is another private label brand. I  
4 believe Mr. Adams may have referenced it earlier is Mainstay.

5 THE COURT: Okay. Was that not in your brand?

6 THE WITNESS: No, sir.

7 THE COURT: Okay.

8 THE WITNESS: There was a time when we did have the  
9 no-name brand in our stores.

10 THE COURT: Okay. You just had a generic product?

11 THE WITNESS: Yes.

12 THE COURT: Without a name on it?

13 THE WITNESS: Yes, sir.

14 THE COURT: The imputed thing is that it's the store  
15 product?

16 THE WITNESS: Yes.

17 THE COURT: I mean, it doesn't have anybody else's  
18 name on it.

19 THE WITNESS: That's right.

20 THE COURT: And it's in a Wal-Mart store.

21 THE WITNESS: That's right. We refer to it as a no  
22 name. There was a time where we had -- when we were -- when  
23 we had stopped shipping the Backyard product, Backyard Grill  
24 product, we had a no name product in there for a time period  
25 as well.

1 THE COURT: Okay.

2 BY MS. GARKO:

3 Q. And just to be clear, that no name product you're  
4 referring to, that was the product that had the Backyard Grill  
5 and design name removed but otherwise had all the packaging  
6 the same?

7 A. That's correct.

8 Q. Mr. Ortiz, were you aware of the financial performance of  
9 Wal-Mart's private label grills and grill accessories before  
10 and after the transition?

11 A. I am, yes.

12 Q. What are you aware of in that regard?

13 A. I'm aware of -- when we did stop shipping the product,  
14 which was during the first part of the year when we stopped  
15 shipping it, our sales went down. Why did our sales go down?  
16 Our sales went down because we were out of stock. Our  
17 percentages of in-stock went down from high 99s to the low  
18 90s or, in some cases, in the 80 percent. So our sales went  
19 down because our in-stock's went down.

20 MR. SHAW: Your Honor, we have to make lack of  
21 foundation. We're talking about the record of sales that had  
22 not been provided to us. It's late disclosure. We have no  
23 documents that we can't possibly cross-examine him on if he's  
24 an expert. They have not provided the data.

25 THE COURT: Overruled.

1 BY MS. GARKO:

2 Q. Once the product was back in stock, are you aware of the  
3 financial performance to the brand after that point in time?

4 A. I am.

5 Q. And what was the financial state of the brand then?

6 A. Well, since we've rebounded and are in-stocks have --  
7 because we've been allowed to ship the product, so our  
8 in-stocks have come back up and our in-stocks are in good  
9 position and thus our sales have rebounded.

10 Q. How do the sales level compare before the transition and  
11 after the transition?

12 A. They're meeting expectations.

13 Q. About does that tell you anything about the Backyard Grill  
14 and design name?

15 A. Well, it does. It tell ms that -- I apologize for the  
16 brand team, but the name really didn't mean anything. In  
17 resonated with the customer because of the organizing  
18 principle. It resonated with customer because of price and  
19 value and that's what they're looking for. Keeping everything  
20 the same and keeping it seamless and keeping it simplified for  
21 them, as well as the stores, tells me the name, in this case,  
22 really didn't mean anything.

23 Q. Did it tell you whether the name's driving sales?

24 A. Clearly, the name would not be the part that's driving  
25 sales.

1 MS. GARKO: No further questions, your Honor.

2 THE COURT: Any cross?

3 MR. ADAMS: No, your Honor.

4 THE COURT: All right. Thank you, sir.

5 (Witness excused.)

6 THE COURT: Next witness.

7 MS. GARKO: Your Honor, one matter we want to deal  
8 with is we have deposition designations of Mr. Blackburn that  
9 we'd like to have admitted. I understand he is here but we're  
10 prepared to go forward with the deposition designations so as  
11 to move this along, if counsel is agreeable to doing that.

12 MR. ADAMS: That's fine with us, your Honor.

13 THE COURT: All right.

14 MS. GARKO: Thank you, your Honor. We will provide a  
15 copy of those to you.

16 THE COURT: Are you ready with the next witness?

17 MR. HOSP: Your Honor, Wal-Mart calls George Mantis.

18 (Witness sworn.)

19 MR. ADAMS: Your Honor, we object to this witness.

20 This witness is here to testify about a survey which was  
21 conducted before and as a part of the summary judgment  
22 proceeding. I think it's a fair characterization of the  
23 summary judgment proceeding that this witness's report was  
24 excluded and was not given any weight. As far as we know, the  
25 survey that he's here to testify to is a likelihood of

1 confusion survey and it has no place in this hearing.

2 THE COURT: Is that what he's here for?

3 MR. HOSP: Your Honor, he is going to testify about  
4 reverse confusion survey that will demonstrate, in fact, there  
5 has been no harm and that goes directly to the sixth factor --  
6 no harm to Variety's brand, which goes to the sixth factor of  
7 the Synergistic case, basically whether or not there is a  
8 public interest in the remedy that's being sought in terms of  
9 disgorgement.

10 MR. ADAMS: Your Honor, that survey is in the record.  
11 It was part of Wal-Mart's summary judgment proceeding  
12 previously. We don't need to hear Mr. Mantis talk about it,  
13 even if it were relevant, but it's not. I mean, reverse  
14 confusion was an issue in the summary judgment proceeding. In  
15 fact, I'm quite certain that your Honor was referring to  
16 reverse confusion on the last page of your order. And for  
17 that reason, that issue is done. There's simply no basis for  
18 wasting our time hearing this witness talking about something  
19 that's already been considered once and rejected.

20 MR. HOSP: Your Honor, to be clear, the summary  
21 judgment did not reference Mr. Mantis's survey and did not  
22 address the survey. Again, this goes directly to the question  
23 of whether or not there has been any harm to Variety's brand  
24 in such a way that it would impact the sixth factor of the  
25 Synergistic factors.

1 THE COURT: Well, I'm not going to rehear things that  
2 I've ruled on already. You're telling me that I didn't  
3 consider that exhibit?

4 MR. HOSP: It was not mentioned in your Honor's  
5 decision.

6 MR. ADAMS: Well, I think the surveys certainly were  
7 mentioned. Of course, I'm not speaking for your Honor, but if  
8 it wasn't mentioned, at least one possibility may be because  
9 it wasn't worthy of mentioning. The fact was it was done in  
10 anticipation of and for purpose of the summary judgment  
11 hearing and motion. It was filed by Wal-Mart and it's in the  
12 record. It's already there.

13 As far as the sixth survey -- the sixth factor is  
14 concerned, I think I pointed out during my opening remarks  
15 that Wal-Mart addressed the Synergistic factors in their own  
16 summary judgment motion. To the extent that it needed to be  
17 addressed by Wal-Mart, it's already been addressed. So that's  
18 another reason why this is a waste of time.

19 MR. HOSP: Your Honor, to be clear, the summary  
20 judgment was on liability alone, so it did not address the  
21 Synergistic factors regarding damages, at least that's my  
22 understanding. And the decision was solely about liability.

23 In this instance we have a situation where the  
24 plaintiff is seeking disgorgement of an enormous amount of  
25 funds. I would ask, if possible, that we be given the



1 opportunity to actually present the evidence that we believe  
2 is relevant to these issues.

3 MR. ADAMS: Your Honor, starting on page 25 of  
4 Wal-Mart's summary judgment memorandum, as part of their own  
5 motion for summary judgment, there's a three-page discussion  
6 of the Synergistic factors. I think we all agree that the  
7 Synergistic factors do not relate to the merits, they relate  
8 to the remedy. That's exact what Wal-Mart tried to convince  
9 your Honor of in their own summary judgment motion was we were  
10 not entitled to a remedy, and one of the reasons was this  
11 gentleman's survey.

12 THE COURT: Well, what other witnesses do you have?  
13 Is this going to go on and on like this? What's the next one?

14 MR. HOSP: We have another survey expert and then two  
15 more Wal-Mart witnesses.

16 THE COURT: We'll take a brief recess. You can stay  
17 here. I'll be back in a second.

18 (Short recess.)

19 THE COURT: I'll hear from this witness. This will  
20 be the last witness for today. Go ahead.

21 MR. HOSP: Thanks, your Honor.

22 GEORGE MANTIS, DEFENDANT'S WITNESS, SWORN

23 DIRECT EXAMINATION

24 BY MR. HOSP:

25 Q. Would you introduce yourself to the Court, please.

1 A. My name is George Mantis.

2 Q. Have you been retained as an expert in this litigation?

3 A. I have.

4 Q. What were you retained to do?

5 A. I was retained to determine whether the use of the mark,  
6 "The Backyard" or a variance such as "Backyard" are likely to  
7 result in reverse confusion.

8 Q. Do you have a particular area of expertise as it relates  
9 to survey work?

10 A. Yes. Survey design and interpretation.

11 Q. Very briefly, can you describe your educational background  
12 as it relates to your expertise.

13 A. I received a bachelor of science degree, master of  
14 business administration and I have a Juris Doctor degree.

15 Q. And are you currently employed?

16 A. I am. I'm self-employed.

17 Q. Where do you work?

18 A. The Mantis Group.

19 Q. What is The Mantis Group?

20 A. A marketing research and consulting firm located in  
21 Chicago.

22 Q. And what exactly do you do?

23 A. I design analysis of consumer research and studies  
24 regarding business issues as well as studies that are used  
25 potentially in litigation.

1 Q. How long have you -- when did you start The Mantis Group?

2 A. In 1985.

3 Q. Prior to that, did you have any experience with respect to  
4 surveys?

5 A. Yes.

6 Prior to 1985, beginning in 1969, I worked for a  
7 major commercial bank and also as a vice president of a  
8 publicly held marketing research firm.

9 So prior to 1985, I had 16 years of continuous  
10 experience in survey research and design.

11 Q. As a general matter over the course of your career, can  
12 you describe your experience with surveys.

13 A. For well over 40 years now, I've designed, as I said,  
14 surveys for business that dealt with products and services, as  
15 well as surveys designed to address a number of legal issues.

16 Q. Have you been qualified as an expert in survey research  
17 before?

18 A. Yes.

19 Q. In what venues?

20 A. Both before the Trademark Trial and Appeal Board and the  
21 courts of major jurisdictions.

22 Q. In these proceedings, was your survey research admitted  
23 into evidence?

24 A. Yes.

25 Q. To the best of your knowledge, have any of your opinions

1 ever been excluded?

2 A. No.

3 MR. HOSP: Your Honor, at this time we offer  
4 Mr. Mantis as an expert in survey research.

5 THE COURT: I'm going to reserve a ruling on this,  
6 too, and test it against the Daubert standard as to whether it  
7 will do any good to assist the finder of fact. If the finder  
8 of fact has weakness in its ability to understand the issues  
9 and the evidence, then it might. If not, it won't. And I'll  
10 rule on that.

11 MR. HOSP: Understood. Thank you, your Honor.

12 BY MR. HOSP:

13 Q. In your role as an expert and based on the survey you  
14 conducted in this matter, did you form an opinion regarding  
15 whether or not there's a likelihood of reverse confusion in  
16 this case?

17 A. I have. In my opinion based on the survey results, the  
18 data demonstrate there is no likelihood of reverse confusion.

19 THE COURT: What's reverse confusion?

20 THE WITNESS: Reverse confusion would occur, your  
21 Honor, where the senior user's mark or owner of the product  
22 bearing the senior user's mark, in this case Variety --

23 THE COURT: I can't hear you.

24 THE WITNESS: In this case Variety, whether consumers  
25 believe that Variety products emanate from Wal-Mart.

1 BY MR. HOSP:

2 Q. Could you just contrast with that with what traditional  
3 confusion is.

4 A. In a case of traditional or forward confusion, that would  
5 test whether the junior user's mark is somehow connected to or  
6 related to the senior user.

7 Q. Can you describe the general format that you used for your  
8 research?

9 A. Yes. The survey was designed to replicate the marketplace  
10 as closely as possible.

11 A threshold question that I addressed was, first,  
12 whether the products bearing the marks at issue are typically  
13 seen by respondents or are respondents consumers typically  
14 exposed to these two marks at the same time or in the same  
15 space.

16 It's my understanding that the products are not in  
17 proximity one to the other because Rose's does not sell their  
18 products at Rose's and conversely Wal-Mart does not sell their  
19 products at Rose's stores. Therefore, the appropriate survey  
20 format is what is known as the Eveready format, wherein  
21 respondents are shown only the product that we are testing to  
22 see whether that product is causing confusion.

23 Q. If you would, turn to Exhibit D 76 in your binder.

24 Could you identify what that document is?

25 A. This is the appendix of the report that I submitted.

1 Q. Okay. And does this include the questionnaire that was  
2 used in the survey?

3 A. Yes, it does.

4 Q. Turning your attention to page -- what's marked in this  
5 Exhibit as page 41, is this the substantive portion of your  
6 survey?

7 A. That is correct.

8 Q. Could you just sort of walk us through exactly what the  
9 process was for someone taking the survey?

10 A. Respondents were pre-recruited to come to an interviewing  
11 facility to participate in a face-to-face interview. Once  
12 they were screened, that is, once a determination was made in  
13 screening that they were qualified to participate in the study  
14 and invited, they were then seated at an interviewing table  
15 facing a product display.

16 Q. And what happened at that point?

17 A. Respondents were told to look at the product display as if  
18 they were considering purchasing the product shown in the  
19 display. In the display were four products, all bearing the  
20 Backyard mark, all products sold at Rose's stores bearing the  
21 Backyard mark. An 18-piece tool set, a charcoal grill, a  
22 grill cover and a package of corn skewers.

23 Q. And when you say the Backyard mark, are you referring to  
24 the Backyard Barbecue mark?

25 A. Yes, that's correct.

1 Q. Okay. What were they asked to do then?

2 THE COURT: If a customer is looking for a grill,  
3 they're going to buy a grill for their house so they can cook  
4 out, and they go into Rose's in Elizabeth City and they shop  
5 for a grill and it says Backyard on it and then they drive  
6 over to Wal-Mart and they look for a grill and it says  
7 Backyard on it, they are going to believe that Backyard is the  
8 same in both places. It's just like if I went into a Lowe's,  
9 a Craftsman is a Sears brand name, trademark name. You know  
10 that?

11 THE WITNESS: Yes.

12 THE COURT: It's a pretty well-recognized proprietary  
13 mark. So if I go into Lowe's and I get a Craftsman drill  
14 because they're selling one, I'm going to think it's a Sears  
15 drill. Just like if I went into Lowe's and I saw a Kenmore  
16 wash machine and it was a place that I didn't think it should  
17 be, I'd still think it was Kenmore. I'd think it was a Sears  
18 product. And I think you can have all the surveys in the  
19 world, but that's the way it goes. If it's a trademark brand,  
20 you're going to think it's the same irrespective of where it's  
21 being sold.

22 THE WITNESS: If, your Honor, under the condition of  
23 typically how consumers shop for products, such as these,  
24 there is no evidence that I can determine that the products  
25 are in the same space, actually in the same store, side by

1 side. I also -- I do not believe that individuals that  
2 purchase products such as these would go through a comparison  
3 where they go to one store and then the other, a Rose's and a  
4 Wal-Mart, in proximate time where they could make that  
5 comparison.

6 The point with survey work, we have to place the  
7 respondent in the shoes of the actual consumer. And we have  
8 to look at what typically would occur in the marketplace.

9 To use your example may place the consumer in a  
10 position where he or she is simply doing side-by-side  
11 comparison which may not be reflective of the reality in the  
12 marketplace.

13 THE COURT: You would agree that things like  
14 Craftsman and Kenmore are brands that are not the name of the  
15 store that they're sold in, but they have a reputation that  
16 transcends that, wouldn't you?

17 THE WITNESS: Yes.

18 THE COURT: Okay.

19 BY MR. HOSP:

20 Q. And so, Mr. Mantis, once the subject was shown the  
21 products, what were they then asked?

22 A. The respondents were then asked two sets of questions,  
23 questions that were designed to test confusion as to source,  
24 sponsorship, approval, authorization, connection, all sources  
25 of confusion that are delineated in the Lanham Act.



1 Q. And did you tabulate the results? What were they then  
2 asked specifically?

3 A. They were asked these two sets of questions.

4 Q. Okay. Did you tabulate the results?

5 A. I did.

6 Q. And if I could direct your attention to demonstratives  
7 that have been marked as DDX-4.1.

8 A. Yes.

9 Q. Can you tell us what these are?

10 A. This table represents the responses to all questions,  
11 responses being company responses, store responses or brand  
12 responses across all questions.

13 For example, out of the 120 respondents in the  
14 survey, nine mentioned Wal-Mart, which is 7.4 percent of the  
15 121. An equal proportion mentioned K-Mart. 11 mentioned  
16 Family Dollar. 18 mentioned Big Lots.

17 The point here is that Wal-Mart mentions are no  
18 greater than mentions for other stores that do not sell  
19 barbecue grills and accessories that bear the Backyard mark.

20 From this, it can be concluded that naming other  
21 stores that do not sell grills bearing the Backyard mark,  
22 individuals are mentioning these stores with no relationship  
23 to Backyard. So some, if not all, respondents that mentioned  
24 Wal-Mart may be doing so for the same reason.

25 Q. And you indicate that the percentage of respondents who

1 responded Wal-Mart with 7.4, does that indicate a likelihood  
2 of reverse confusion?

3 A. No, it does not.

4 Q. Why not?

5 A. That alone, taking as a proportion without any further  
6 information that is gleaned from the survey, that proportion  
7 alone, standing alone would not represent an actionable level  
8 of confusion.

9 Q. Did you do anything else to determine whether or not the  
10 mentions of Wal-Mart actually related to the use of the  
11 Backyard Barbecue mark that the respondents saw?

12 A. Yes, I did.

13 Q. What did you do?

14 A. For every response given, respondents are asked what makes  
15 you say that or what makes you say Wal-Mart. These were  
16 open-ended questions and the responses were recorded  
17 open-endedly or verbatim.

18 I reviewed the verbatim responses and was able to  
19 objectively categorize individuals into four groups. The  
20 first group -- and I'm looking at only the Wal-Mart responses.  
21 The first group comprised two individuals, two respondents,  
22 that mentioned Wal-Mart for name-related reasons. These  
23 individuals were clearly confused. They demonstrated  
24 confusion.

25 Two respondents mentioned Wal-Mart in a very clerical

1 fashion, giving name-related reasons in an ambiguous way and  
2 simply said could be Wal-Mart, may be Wal-Mart. These are  
3 indications of the possibility of confusion but not probable  
4 confusion. And the test is probable confusion. A mere  
5 possibility is not sufficient.

6           The remaining five out of the nine that mentioned  
7 Wal-Mart also mentioned a number of other stores as well,  
8 clearly an indication that individuals are either guessing  
9 Wal-Mart or they're responding to the question that grills and  
10 grilling accessories come from a number of different stores  
11 like Wal-Mart or Target or K-Mart or a combination of stores  
12 that they mentioned. Again, these are not name related or  
13 confusion responses.

14           The remaining 112 showed no connection with Wal-Mart  
15 whatsoever.

16 Q. What conclusion did you draw from that analysis?

17 A. The conclusion that I draw from the analysis is that  
18 only 2, 1.7 percent, of all respondents surveyed, and even  
19 considering sampling error of 2.3 percent, the range of  
20 confusion or the confusion responses range from zero percent  
21 to 4 percent.

22           So the conclusion that I would draw is that  
23 individuals exposed to these products with the questions  
24 thoroughly addressing likelihood of confusion issues are not  
25 likely to mistakenly believe that Wal-Mart makes, puts out,

1 authorizes, sponsors, approves or is connected to or  
2 affiliated with Variety.

3 Q. Did you consider in review a report submitted by  
4 Robert Klein a rebuttal report in this action that criticized  
5 the methodology of your survey?

6 A. I did.

7 Q. I ask, how do you respond to Mr. Klein's criticism that  
8 your study used survey stimulus that is inappropriate.

9 A. I disagree with Mr. Klein's statement in his report that  
10 because respondents in the screening process were asked what  
11 stores they would consider shopping at or have shopped at for  
12 grills and grilling accessories that somehow that led  
13 respondents to a certain response, for example, a Rose's  
14 response. I disagree with that for the simple reason that  
15 individuals were asked about 14 other stores as well.

16 Q. How do you respond to Mr. Klein's criticism that  
17 Wal-Mart's Backyard Grill mark is not well-known?

18 A. Well, clearly, Variety in its own moving papers, would  
19 disagree with Mr. Klein.

20 Q. How do you respond to Mr. Klein's criticism that the  
21 exposure to the two brands in the marketplace is sufficiently  
22 close in space?

23 A. Well, as I mentioned, Rose's products are not sold at  
24 Wal-Mart, and, conversely, Wal-Mart's product are not sold at  
25 Rose's.

1 Q. And how do you respond to Mr. Kleins' criticism that  
2 exposure to the two brands in the marketplace is sufficiently  
3 close in time?

4 A. Mr. Klein, in his report, relies on a finding in the study  
5 I conducted that out of the 121 respondents, 120, virtually  
6 all, indicated that they have shopped at or would consider  
7 shopping at Wal-Mart for grills and grilling accessories.

8 Based on that, he concludes that there's proximity in  
9 time. However, Mr. Klein cannot identify any respondents that  
10 have actually shopped at Wal-Mart, or those that have shopped  
11 when they shopped or even among those that he knew when they  
12 shopped, if that shopping was contemporaneous with shopping at  
13 Rose's.

14 Q. Based on those responses, how do you respond to  
15 Mr. Klein's criticism of the survey format that you used, the  
16 every ready format?

17 A. Again, the use of an Eveready or non-Eveready format and  
18 Mr. Klein espouse's the use of what's called a squirt format  
19 or product lineup, showing both products to respondents and  
20 asking them simply are these products made by the same company  
21 or different companies, I don't believe that that is  
22 consistent with marketplace reality and, as such, would create  
23 an artificial test of whether confusion exists.

24 In a nutshell, we have to place the respondent in the  
25 footsteps or the shoes of the actual purchaser. If the actual

1 purchaser is not exposed to these products and is sufficiently  
2 close in time or space, then the test showing both products  
3 artificially creates a research environment that does not  
4 replicate the marketplace.

5 Q. How do you respond to Mr. Klein's suggestion that your  
6 survey used questions that were leading or irrelevant?

7 A. As I understand Mr. Klein's report, he suggests that the  
8 first question implies that there's only one source.

9 Mr. Klein disregards the fact that two additional questions  
10 were raised and apparently did not really review the data that  
11 were provided to him, wherein personally -- or well over one  
12 half of all respondents mentioned two or more services.

13 Q. Mr. Klein also noted that you didn't use a control in your  
14 survey. How do you respond to that?

15 A. Well, based on the findings of the study, if the findings  
16 are, in fact, that the study demonstrates that a de minimis or  
17 minimal mantra or proportion of individuals are confused, the  
18 1.7 percent, and going to the purpose of a control which is to  
19 estimate is that percentage based on anything that's unrelated  
20 to the mark.

21 In other words, accounting for guessing and things of  
22 that nature, if the proportion is de minimis, a control can  
23 only lower that proportion. A control would not be necessary  
24 in this study to make a determination if the level of  
25 confusion is actionable and also whether, in fact, one can

1 opine that there is no likelihood of confusion.

2 Q. Did you use anything as a proxy for control in your  
3 analysis?

4 A. Yes. The proxy, as I described the categorization of  
5 respondents in the four groups, I used their actual verbatim  
6 responses, which provides a window, if you will, to  
7 understanding their thought process.

8 Q. Finally, how do you respond to Mr. Klein's criticism that  
9 your survey questions skewed the results in terms of the  
10 screening questionnaire?

11 A. Again, as I understand Mr. Klein's critique, and this one  
12 was very difficult to agree with and I totally disagree,  
13 Mr. Klein believes that because individuals were asked about  
14 companies and stores that they have shopped at or would  
15 consider shopping for, somehow individuals would go out and  
16 familiarize themselves with the subject matter and that would  
17 lead to a Rose's response or a non-Wal-Mart response. I find  
18 that extremely illogical. If that were the case, then  
19 individuals had equally opportunity to go to 13 other stores  
20 and do the same.

21 Q. Having considered Mr. Klein's rebuttal report, is there  
22 anything in there that changes your conclusions?

23 A. No.

24 MR. HOSP: Your Honor, nothing further.

25 At this point, we would offer D 76 and then

1 demonstratives DDX-4.

2 THE COURT: They're received.

3 (Defendant's Exhibit D76 and Demonstrative DDX-4  
4 received.)

5 MR. HOSP: One other matter, your Honor, apparently  
6 earlier I inadvertently forget to admit Dr. Van Liere's CV  
7 which is D176. I offer it now.

8 THE COURT: Received.

9 (Defendant's Exhibit 176 received.)

10 THE COURT: Any cross?

11 MR. LONG: It will be the shortest question of the  
12 day.

13 THE COURT: Because if it's not, we'll go home.

14 CROSS-EXAMINATION

15 BY MR. LONG:

16 Q. Mr. Mantis, what was question one in your survey? Do you  
17 recall?

18 A. I don't want to misstate it.

19 "What company or store do you think makes or puts out  
20 the product shown in the display?"

21 Q. In the book I just handed you, would you turn to tab 2.

22 This is the Court's summary judgment order in this  
23 case. Turn, if you would, to page 12 of tab 2.

24 A. Yes.

25 Q. At the bottom of the page, do you see in the last



1 paragraph that continues on to the next page in quotations?

2 A. Yes.

3 Q. Would you read what's in this quotation, please.

4 A. Where it begins with "do"?

5 Q. Yes, sir.

6 A. "Do you believe that these products are sponsored,  
7 approved or authorized by any company or store, or do you  
8 not?"

9 Q. That sounds a lot like your question one, doesn't it?

10 A. Well, I think the question format is different.

11 Q. Would you continue on with the quotation that continues to  
12 the next page?

13 A. "Do you believe that these products are connected or  
14 affiliated with any other company or store, or do you not?"

15 Q. Likewise, that sounds similar to your question one?

16 A. Well, they get to the same issue of source, connection,  
17 affiliation, authorization or sponsorship.

18 Q. I have one more question.

19 Would you read that paragraph on page 12 at the  
20 bottom that starts with, "defendant."

21 A. Where are you, counsel?

22 Q. Page 12.

23 A. Yes.

24 Q. The paragraph that starts with "defendant."

25 A. "Defendant, on the other hand, has offered a survey which

1 claims to prove that there has been no actual confusion.

2 However, the Court fundamentally disagrees with the way the  
3 survey was conducted and thus affords it relatively little  
4 weight."

5 Q. Keep going, please.

6 A. "The survey asked Wal-Mart shoppers in North Carolina  
7 questions such as" --

8 Do want me to continue?

9 Q. Yes.

10 A. "Do you believe that these products are sponsored,  
11 approved or authorized by any company or store, or do you not  
12 believe that these products are connected or affiliated with  
13 any other company or store, or do you not?"

14 Q. Please continue.

15 A. "However, the Court does not believe these questions  
16 squarely address the crux of the confusion issue. The issue  
17 is not whether consumers think Backyard branded products are  
18 owned by Variety. For customers shopping at Rose's or  
19 Wal-Mart have no reason to believe that Backyard is an  
20 in-store brand at all. Instead, consumers would believe  
21 Backyard was another brand of grill, such as Char Broil,  
22 Weber, Coleman or any other brand of grill the stores my  
23 offer. Consequently, consumers would have no reason to  
24 associate Backyard branded grills with another company or  
25 store, so they reply in the negative and the question posed

1 above may actually tell very little about whether they were  
2 confused in the way that is material in this case."

3 Q. Thank you. I have one more question.

4 Were you in the courtroom earlier when the  
5 stipulations were read as to the dollar figures involved?

6 A. Are you referring to the first part?

7 Q. Yes, the very beginning.

8 A. I was in the courtroom.

9 Q. There's a stipulation, No. 12, that deals not with dollars  
10 but the units sold. This is in the pretrial order. And  
11 there's a factual dispute about whether it's roughly 110  
12 million units sold or 108 units sold. For our purposes, let's  
13 just round it to 100 million units.

14 In your survey, you identify a little over 7 percent  
15 confusion?

16 A. I did not.

17 Q. Did you not just say 7 percent Wal-Mart responses?

18 A. Yes, but I -- with categorizing responses appropriately.

19 Q. What was the percentage that you said?

20 A. 1.7 percent.

21 Q. Let's go with 1.7.

22 What's 1.7 percent of 100 million?

23 A. Well, it's sufficiently large that I can't calculate it.

24 Q. It's a large number of confusion. Even at 1.7 percent  
25 confusion that you found, we're still talking over a million

1 people that could be confused, and over a 100 million units  
2 sold?

3 A. Yes.

4 MR. LONG: Thank you. No more questions.

5 MR. HOSP: Let me just redirect on that.

6 REDIRECT EXAMINATION

7 BY MR. HOSP:

8 Q. Mr. Mantis, counsel was just asking you about people who  
9 would have been confused thinking that the Wal-Mart brand was  
10 the Variety brand. Is that what reverse confusions tests?

11 A. No, it does not.

12 Q. Okay. So does the 100 million that counsel referred to,  
13 does that have anything to do with your survey?

14 A. No.

15 Q. Thank you.

16 A. I assumed counsel was talking about forward confusion,  
17 because that's what we were talking about this morning.

18 MR. HOSP: Thank you.

19 THE COURT: See you at 10:00 tomorrow morning.

20 (Adjournment until 10:00 a.m. on October 11, 2016 )  
21  
22  
23  
24  
25

## 1 CERTIFICATE

2 THIS IS TO CERTIFY THAT THE FOREGOING TRANSCRIPT OF  
3 PROCEEDINGS TAKEN AT THE AFOREMENTIONED SESSION OF UNITED  
4 STATES DISTRICT COURT IS A TRUE AND ACCURATE TRANSCRIPTION OF  
5 THE PROCEEDINGS TAKEN BY ME IN MACHINE SHORTHAND AND  
6 TRANSCRIBED BY COMPUTER UNDER MY SUPERVISION.

7 THIS THE 14 DAY OF October, 2016.

8  
9 /S/ MARGARET M. KRUSE

10  
11 MARGARET M. KRUSE  
12 OFFICIAL COURT REPORTER  
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